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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-930

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., *Petitioners*

v.

EAZOR EXPRESS, INC., ET AL., *Respondents*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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13096-12-75

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APPENDIX A

Opinion and Order of District Court on Liability (March 30, 1973)

UNITED STATES DISTRICT COURT, W. D. PENNSYLVANIA

Civ. A. Nos. 68-1014, 69-1235

March 30, 1973

EAZOR EXPRESS, INC., a corporation, *Plaintiff*,

v.

The INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 249, *Defendants*.

DANIELS MOTOR FREIGHT, INC. and Eazor Express, Inc., *Plaintiffs*,

v.

LOCAL 377, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, *Defendants*.

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Opinion

TEITELBAUM, District Judge.

These are actions in which the plaintiff employers, Eazor Express, Inc. ("Eazor") and Daniels Motor Freight, Inc. ("Daniels"),[1] seek to recover damages for unlawful strikes

[1] At the time of the events complained of, Eazor, which had contracted to purchase all of the outstanding stock of Daniels, was operating Daniels by virtue of an authority of temporary control issued to it by the Interstate Commerce Commission. The transaction was eventually consummated on April 30, 1970. Moreover, Daniels' labor agreement provided that in the event another company assumed temporary authority of Daniels' operations, that company would assume the obligations of the agreement. Since

from the defendant labor organizations, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("International") and two of its locals, Local 377 and Local 249. The jurisdictional basis of both actions, which were consolidated for trial,[2] is stipulated by all parties to be § 301 of the Labor-Management Relations Act of 1947 (29 U.S.C. § 185, as amended). Section 301 provides, in pertinent part, that,

> "[S]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court. . . ."

The contracts alleged by the plaintiffs to have been violated are the National Master Freight Agreement, covering the period April 1, 1967 through March 31, 1970, to which the plaintiffs, the defendant locals, and the National Over-The-Road and City Cartage Policy and Negotiating Committee of the International ("National Committee") were parties, and the various supplements thereto, *viz.* (1) (a) the Joint Council No. 40, Freight Division, Over-The-Road Supplemental Agreement and (b) the Joint Council 40, Freight Division, Local Cartage Supplemental Agreement, both being between Eazor, the National Committee and Local 249, and (2)(a) the Central States Area Over-The-Road Supplemental Agreement, with Ohio Rider, and (b) the Central States Area Local Cartage Supplemental Agreement, both being between Daniels, the National Committee and Local 377, and (3) the National Iron and Steel and Special Commodities Supplemental Agreement.

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the rights of an agreement generally follow the obligations and, of course, since Eazor was operating Daniels under an authority of temporary control, for purposes of these actions at least, Daniels was essentially, and will be treated as, an operating subsidiary of Eazor.

[2] The trial, which was non-jury, was bifurcated. Consequently only the first stage, at which only evidence relevant to the issues of liability was adduced, has been completed. At this juncture, then, I will treat with and dispose of only the issues of liability.

The alleged violations of these contracts are strikes—one by Local 377 against Daniels (at all relevant times Local 377 was the exclusive bargaining agent for drivers, dock employees, and garage employees working out of or at Daniels' terminal at Warren, Ohio) and one by Local 249 against Eazor (at all relevant times Local 249 was the exclusive collective bargaining agent for drivers, helpers, and warehousemen working out of or at Eazor's terminal at Pittsburgh, Pennsylvania). The strikes began on August 20, 1968, when the members of Local 377 walked off their jobs at Daniels' Warren terminal. By the following morning, August 21, a picket line had been established at Eazor's Pittsburgh terminal which was not only honored but supported by members of Local 249. The ensuing strikes of both terminals, which were characterized by roving bands of pickets and notable violence, ended for Daniels on September 17, 1968, when the terminal was permanently closed [3] and for Eazor on September 25, 1968, when the members of Local 249 returned to work.

Neither strike was authorized or sanctioned, either by the respective local officials or by International officials, i.e., each was a "wildcat" strike.[4] Both, however, were admittedly violations of the "no strike" provision of the supplements to the National Master Freight Agreement which recites as follows:

> "The Union[s] and the Employers agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of [a] settlement, as provided for in this Agreement [and in the National Agreement, if applicable] of any controversy which might arise." [5]

[3] The terminal has never been reopened.

[4] The term "wildcat" strike is interpreted differently by the parties to this action. I use it to mean a strike which is not authorized by union officials, rather than not authorized by the labor agreements.

[5] It is not disputed that neither of the two grievances which immediately precipitated the strike had been processed through all of the steps of the grievance machinery at the time of the strikes.

Accordingly, the contentions of the parties surround the issues of liability for any damages caused by the strikes. The International contends (1) that it is not a party to any of agreements and (2) even if it is, it did all that the agreements obliged it to do. Locals 377 and 249 deny liability (1) because the agreements provide that only specially designated stewards and alternates have authority to call strikes and that none of those so designated called the strikes, and (2) that the agreements provide that they shall not be held liable for the unauthorized acts of stewards and alternates generally.

The Daniels' Strike Was Not Authorized.

Locals 377 and 249 rely on Article 4 of the National Master Freight Agreement which provides as follows:

> "Job Stewards and alternates have no authority to take strike action . . . except as authorized by official action of the Local Union. The Employer recognizes these limitations upon the authority of job stewards and their alternates, and shall not hold the Union liable for any unauthorized acts."

Article 4 further, as the *quid pro quo* for the employers relinquishing of any rights it may have against the union for unauthorized work stoppages, vests in the employer the unquestionable authority to "impose proper discipline, including discharge, in the event the shop steward has taken unauthorized strike action." The Central States Area supplements complement this provision.[6] Article 43, Section 2 of the Central States Area supplements requires the local union to furnish, within two weeks of the signing of the agreements, the employer with a list of its members who have the authority to act for the union in calling strikes, and provides (1) that the union "shall not be liable for

[6] Probably inadvertently, the Joint Council No. 40 supplements do not. There is no contention, however, that the strike by Local 249 was called by anyone authorized to do so.

any activities unless so authorized" and (2) that in the event of an unauthorized strike the union "shall not be liable for damages." Article 43, Section 2 further, however, makes it mandatory for the union to,

> ". . . undertake every reasonable means to induce [striking] employees to return to their jobs during any [unauthorized strike]."

The representative designated pursuant to Article 43, Section 2 of the Central States Area supplements was John J. O'Neill, at all relevant times a business agent for and a vice-president of Local 377. The plaintiffs urge that O'Neill actually called the strike, and, resultingly, that the liability of Local 377 and the International is patent. The initial factual issue to be resolved, then, is whether or not the evidence supports the conclusion that O'Neill in fact called the strike in Warren.

Many of the events surrounding the inception of the strike in Warren are undisputed. On Saturday, August 17, 1968, the employment of Kenneth Roper, a garage employee of Daniels and a member of Local 377, was terminated because he refused a work assignment. On Monday, August 19, the employment of Jack Eckley, a driver employee of Daniels and a member of Local 377, was terminated similarly because he refused a work assignment. To attempt to resolve the outgrowing grievances of Roper and Eckley, meetings were held at Daniels' Warren terminal on the morning of August 20, between representatives of Daniels and of Local 377. In attendance at the meetings, among others, were O'Neill, the grievants, and Clyde Clark, a manager of Daniels.

The meetings not only proved fruitless, but served to inflame the antagonists. At the trial there was uncontroverted testimony of heated verbal exchanges and physical shovings. The testimony regarding the note on which the meetings concluded and the events which followed the meetings,

however, was not uncontested. Clark testified that as the meeting ended O'Neill said, "I'm giving you a seventy-two hour strike notice for your Ohio Southern Drivers." He testified that immediately after the meeting he saw O'Neill walking about the terminal and that within ten minutes of the last time he saw O'Neill, a driver named Gene Latta advised him that "the terminal was going to go out on strike."

O'Neill readily admitted walking about the terminal and, in fact, talking with the employees. He testified that it was his practice to mingle with the employees, at least those who were members of Local 377, when he visited a terminal; that he made it "a point [that day] because it was right prior to election"; and that he talked with the employees generally about "beefs" or grievances they had and about the meetings which had taken place that morning. But O'Neill denied that he threatened to call a strike. Rather, he testified that at the meeting he made "absolutely" no reference to Clark of a strike. Further, he testified that from the terminal he proceeded to "Huffman's", a truck stop which was located across the street from the terminal and talked with the members of Local 377 who were gathered there. He testified that, in fact, he talked there with Eckley about the meetings and that when Eckley suggested that he was going to start picketing, he counseled him "that he had better not". Notwithstanding his advice, however, later that afternoon Roper and Eckley, each with a little camp stool and a placard reading "Unfair Labor Practice", began to picket Daniels' Warren terminal and thus the strikes were precipitated.

Although the circumstances and the sequence of events are undeniably suspicious, I find, in the absence of evidence to contradict the testimony of O'Neill as to the essence of the text of his conversations with the employees both at the terminal and at Huffman's, and in the light of the substantially corroborative testimony of Bob Eliser and John

Arnold, two officials of Local 377 who were with O'Neill at times during the day of the inception of the strike, that he did not call the strike, and that, in fact, he cautioned against it. Therefore, since there is no evidence of designations of any other officials or members of Local 377 as having been conferred the authority to call strikes, I conclude that the strike was not authorized by Local 377. Cf. Blue Diamond Coal Co. v. United Mine Workers of America, 436 F.2d 551 (6th Cir. 1970).

EACH DEFENDANT'S OBLIGATION WAS TO USE "EVERY REASONABLE MEANS" TO END THE STRIKE

Alternatively, the plaintiffs seek to impose liability on Local 377, as well as on Local 249 and the International, on the theory that the agreements were breached in that every reasonable means to end the strike was not undertaken.[7] With respect to Local 377, the duty is express.

[7] The plaintiffs have also pressed as a theory of at least Locals 377 and 249's liability, their vicarious responsibility for the "mass action" of their membership. This theory, first announced as a "principle of law" in United States v. United Mine Workers of America, 77 F.Supp. 563 (D.C.D.C.1948) and most recently invoked in Vulcan Materials Co. v. United Steelworkers of America, 430 F.2d 446 (5th Cir. 1970), *cert. denied*, 401 U.S. 963, 91 S.Ct. 974, 28 L.Ed.2d 247 (1971), and Colt's Inc. v. Amalgamated Local 376, 314 F.Supp. 578 (D.C.D.Conn. 1970), holds that,

> "... as long as a union is functioning as a union it must be held responsible for the mass action of its members." United States v. United Mine Workers of America, *supra*.

I think the principle well conceived but inappropriate to this action simply because by the terms of the National Master Freight Agreement the plaintiffs have agreed to "not hold the Union liable for any unauthorized acts". See Adley Express v. Highway Truck Drivers and Helpers, Local 107, 47 F.R.D. 356 (D.C.E.D.Pa. 1969). To apply the "mass action" principle, which I perceive as making the union as an entity liable for the actions of any mass of its members with respect to any particular employer, in the face of the instant agreement would be to not only negate but rewrite its express provision to the contrary.

Article 43, Section 2 of the Central States Area supplements obligates the union to "undertake every reasonable means to induce employees [engaged in an unauthorized work stoppage] to return to their jobs". No similar provision, however, is contained in the Joint Council No. 40 supplement or the National Master Freight Agreement. If either, or both, Local 249 or the International is obligated to do likewise, then, the obligation must be implied. Moreover, since both Local 249 and the International are expressly not liable for unauthorized strikes, any such obligation must be implied without reliance on and quite apart from any principles of vicarious liability.[8]

Whether or not the obligation expressed in the Central States Area supplements is implicit in the Joint Council No. 40 supplements and the National Master Freight Agreement involves an interpretation of the agreements. The principles which control the interpretations of collective bargaining agreements were recently reviewed in Kellogg Company v. NLRB, 457 F.2d 519 (6th Cir. 1972). There, quoting from Refinery Employees' Union v. Continental Oil Company, 160 F.Supp. 723, 731 (D.C.W.D.La. 1958), it was stated *inter alia* that:

> "[C]ourts cannot make contracts for the parties, and can declare implied obligations to exist only when there is a satisfactory basis in the express provisions of the agreements which make it necessary to imply certain duties and obligations in order to effect the purposes of the parties. Before an obligation will be implied it must appear from the contract itself that it was so clearly in the contemplation of the parties that they deemed it unnecessary to express it, and therefore omitted to do so, or that it is necessary to give effect to and effectuate the purpose of the contract as a whole."

[8] See n. 7.

If a duty to undertake every reasonable means to put an end to an unauthorized strike is to be implied, the main wellspring from which it must arise is the express duty of the unions, as entities, to refrain from striking the employers of its members. One of the premises central to the concept of collective bargaining, itself the cornerstone of labor-management relations, it that labor unions represent and bargain on behalf of their members. Labor unions ostensibly exist for the sole purpose of equalizing the obvious and socially intolerable imbalance of power between employer and employee which would prevail in their absence.

Concededly, the duty not to strike imposed by the agreements involved in this action inhibits only strikes called, authorized or comforted by the unions' officials. The duty is probably the most important one undertaken by the unions. As was observed in Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957), quoting from S.Rep. No. 105, 80th Cong., 1st Sess., p. 16,

> "[T]he chief advantage which an employer can reasonably expect from a collective [bargaining] agreement is assurance of uninterrupted operation during the term of the agreement."

The importance of the recognition by a union of that expectation with respect to "no-strike" provisions is both demonstrable and critical to industrial peace. Thus, labor agreements must always be construed with that expectation or end in mind. It would seem, then, that purely as a matter of interpreting the agreements with a view to effectuating the purpose of the contract as a whole, the employer having dealt with its employees collectively through their representative, it is reasonable to imply an obligation by their representative to take whatever reasonable measures are available and indicated to prevent or bring to an

end an activity engaged in by its members in which it as an entity is not free to engage.[9] The reasonableness of imposing this burden on the union is particularly apparent where, as here, the benefits of the concession exacted from the employer in return for the no-strike obligation, *viz.*, the agreement to submit grievances to final and binding arbitration,[10] inure directly to its members, indeed, as well as to those of its members who instigated the strike.

Additionally, as a matter of public policy it is desirable to impose an obligation upon a union to take steps to frustrate its members from doing that which it is contractually prohibited from doing as an entity. The emphasis which federal labor law and the policy underlying that law, places on the peaceful resolution through arbitration of industrial disputes, and the avoidance, wherever and whenever possible, of labor strikes,[11] particularly those involving violence, suggests that such an obligation be implied most needfully, and consequently most readily, in

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[9] That the implied obligation requires affirmative action to carry out, while the express obligation is merely to refrain from action is of no moment. The agreement imposes many duties upon the unions which require affirmative action. It is a "living" agreement; it is one which, unlike a contract calling for a single performance, is carried out by both sides daily during its effective term.

[10] See The Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970).

[11] See The Boys Markets, Inc. v. Retail Clerks Union, *supra*, n. 10; United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960); and Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957).

instances of "wildcat" strikes.[12] Therefore, in conclusion, I think that a fair reading of the Joint Council No. 40 supplements, as well as the National Master Freight Agreement, in the context both of the meaningful effectuation of the purposes of the express provisions of the agreements, and of federal labor policy, requires the implication of an obligation upon both Local 249 and the International to undertake every reasonable means to induce "wildcat" strikers to return to work.[13]

NEITHER LOCAL EMPLOYED "EVERY REASONBLE MEANS" TO END THE STRIKE.

It is not disputed that the strikes, both of Daniels' Warren terminal and of Eazor's Pittsburgh terminal, were publicly denounced as illegal by each of the unions' officials. Nor is it disputed that O'Neill of Local 377 and Thomas Fagan, president of Local 249, told the strikers of their respective locals to return to work. O'Neill testified that he first learned of the strike on the evening of August 20, when he received a telephone call at home. He testified that that night he instructed Gene Martin, a union steward, to "tell those guys to get to work"; that the next morning he went to Daniels' terminal and told the men who were picketing there that "they better get back to work"; and that from there he proceeded to Huffman's where he told the men gathered there they "had better get back to work". He testified that he then returned to his office where he received a telephone call from Bill Presser of Joint Council No. 41; that Presser agreed to dispatch two men to assist him in his efforts to get the strikers back to work, which he did; and that the three of them went to Huffman's where they unsuccessfully tried to get the men to return to work. Further, he testified that about a week after the strike began he was advised by Presser that arrangements had been made to expedite the grievances of Roper and Eckley; that he reported the availability of the arrangements to the men on the picket line; and that the "offer" was unhesitatingly and resolutely rejected.

[12] Moreover, realistically, in the absence of such an implied obligation, without intending to impugn the integrities of any of the unions involved in this action, the way is clear for a union to furtively call for or encourage an activity while publicly disavowing it.

[13] See, *contra*, United Construction Workers v. Haislip Baking Co., 223 F.2d 872 (4th Cir. 1955), *cert. denied*, 350 U.S. 847, 76 S.Ct. 87, 100 L.Ed. 754 (1955).

He testified further that there was a meeting on September 3, 1968, the principals at which were himself, Presser and a number of the strikers, including Martin, who was apparently one of the leaders of the strikers. At the meeting the men were told they had to go back to work before the grievances were processed. The men responded by inviting Presser to "go to hell". O'Neill had no recollection of other efforts during the remainder of the week of September 3 to end the strike, i.e., efforts *vis-a-vis* the members of Local 377.

The next meeting with the men took place on September 9. It was called by the union and was held at the union hall. It was attended by "just about every man from the company with the exception of those who were sick or on vacation", or by approximately 250 to 300 men. O'Neill testified that he presided over the meeting and that he urged all those in attendance to go back to work. He testified that the principal speaker at the meeting was an attorney, Bernard Berkman. He testified that Berkman also urged them to go back to work, but that they voted "almost to a T" to continue the strike. Thereafter, Daniels on September 17 discharged all of its striking employees and on September 18 permanently closed its Warren terminal. In sum, all of the efforts of the officials

of Local 377 to end the strike took the form of urgings or cajolings to the men to go back to work.

I do not think that the efforts of the union amounted to a discharge of its duty to undertake every reasonable means to effect the cessation of the strike. I think the evidenced policy of simply urging the men to return to work was far too timid. Many other and potentially more effective approaches were available to the union. O'Neill admitted the union's right to "lift a . . . member's 'book' ", yet it did not do so. Indeed, the evidence is that a number of the strikers worked for other companies during the strike. Most likely this would not have been possible had the union lifted the "books" of the strikers. Nor at any time during the strike were the strikers even threatened with discipline or fines, much less actually disciplined or fined. Further, at at least two meetings at the union hall of the strikers, O'Neill permitted only visual voting rather than voting by secret ballot.[14] In general and in short, the toughness with which the union officials approached their striking members was less than intimidating.

Whether or not any of the untaken tacks or unsummoned measures would have produced the cessation of the strike is unknowable. It is important only that they were reasonable, available, significant and potentially productive. I conclude, then, that Local 377 breached its labor agreement with Daniels in that it failed to undertake every reasonable means to induce the "wildcat" strikers to return to their jobs.

Local 249 not only had a like obligation, it discharged it with a like lack of imagination. Fagan testified that he first learned of the strike of the Eazor terminal in Pittsburgh on the morning of August 21. He testified that he

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[14] Interestingly, the strike by Local 249 was ended on the first secret ballot vote by the strikers.

proceeded immediately to the terminal where he "notified" the strikers of the illegality of the strike.[15] He testified further that his initial strategy, after failing in his personal attempts to persuade the strikers to return to work by request, was (1) to hold a meeting among Eazor's principals (Thomas and Robert Eazor), representatives from the International and Joint Council No. 40 (Norman Kegel and Daniel DeGregory), and the leaders of the strikers (William Gilmer and Robert McLallen),[16] at which he ordered the dissidents to return to work, and (2) to hold a meeting of the striking members of Local 249 at which he employed "all the persuasive ways that [he] could think of" to try to talk the men into going back to work. He testified that at the meeting of the strikers, which took place three days after the strike began, a "vote" was taken by a show of hands which was carried by those opposed to ending the strike. Neither meeting was fruitful.

Fagan testified further that on September 4, on his instructions, a letter was written to the International for the purpose of enlisting their assistance in getting the men to go back to work. In response the International sent three men to speak at another meeting of the strikers which Fagan arranged for September 14. At that meeting, attended by approximately 150 men, all three men sent by the International, as well as Fagan, implored the strikers to resume working. They told them that until they resumed working "there was no way that there could be any help forthcoming from the International". The men angrily rebuffed their pleas. Following that meeting, although there were a few meetings of small groups, there

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[15] In addition to honoring the pickets from Local 377, the men from Local 249 struck over their own long pending unresolved grievances regarding the maintenance of working standards.

[16] The latter two were steward and committeeman, respectively, for the over-the-road drivers at Eazor's Pittsburgh terminal.

were evidently no other mass meetings with the strikers until that of September 24 at which they voted, by secret ballot, to return to work. Fagan led the men back to work the next day.

Fagan testified, concludingly, with no specifics aside from his allusions to his commands to the men to return to work, that "at all times [he used his] best efforts in attempting to get [the] men back to work". He testified, too, that at the meeting attended by approximately 150 men he made veiled threats in the form of advising the men of the power of the union to fine, suspend or expel them for their illegal actions. He testified, however, that he never threatened either the stewards or the committeemen with removal.

I do not doubt that the mood of the strikers was ugly—that is perfectly evident from the violence which occurred during the strike. But that mood made bold, firm steps to return the men to work all the more imperative. I think that the circumstances called for the politics of power rather than the politics of persuasion. The contractual duty of the union went beyond merely beckoning the strikers back to work. It made it mandatory for the union to undertake every reasonable means, of course, available and indicated to cause the strikers to return to work. I think too many resources were available and indicated, including removing the stewards and committeemen who were leading and organizing the strike; insuring that no strikers were elsewhere employed (as in fact they were) during the strike by lifting their "books", or at least by forbidding their use of the union's hiring hall facilities in seeking other employment; imposing daily fines on all strikers; and taking "votes" by secret ballot, and were untapped. Consequently I conclude that Local 249 breached its labor agreement with Eazor.

THE INTERNATIONAL IS A PARTY TO THE NATIONAL MASTER FREIGHT AGREEMENT.

The plaintiffs lastly contend that in addition to Locals 377 and 249, the International violated the contracts. The International denies not only that it failed to live up to what would have been its obligations had it been a party to the contracts, but also that it is a party to them.

In a technical sense, the International's latter position is unassailable. It was not a signatory to the agreement; rather its "National Committee" was. The inquiry, then, must be into the relationship between the National Committee, the signatory to the agreements, and the International.

The authority for the National Committee originated with a resolution of the Executive Board of the International. The authority was granted for the purpose of accomplishing national bargaining and national agreements, which were deemed by the Executive Board to be in the best interests of all the members of the International. The actual creation of the National Committee was by way of a resolution of a "Conference of Representatives" from the International's local unions and joint councils. Finally, the National Committee was activated, at least in form, by virtue of a power of attorney from the International's unions.

Notwithstanding the formalities surrounding its creation, the National Committee is intimately associated with the International. At all relevant times its members were appointed by the president of the International pursuant to authorization from the Executive Board; many of its members were contemporaneous members of the International's Executive Board; it was chaired by the president of the International; its funding was controlled by the International; and the International conducts the ratification vote its constitution requires after a national accord with its members' employers is reached. The

National Committee has no status or shape as a labor organization independent of the International. It has no constitution or by-laws, and files no reports with the Department of Labor as it would be required to do if it were a labor organization. In short, it is organizationally and functionally an administrative arm of the International. Its sole purpose, to achieve national negotiations and national agreements, furthers the aims of the International. While it may act, in terms of the sophistries, on behalf of the local unions, in terms of the realities, it acts on behalf of the International. I conclude, therefore, that the International, through its National Committee, is a party to the labor agreements.[17]

THE INTERNATIONAL DID NOT EMPLOY "EVERY REASONABLE MEANS" TO END THE STRIKE.

As a party, the International's obligation, like Local 249's, is implicit. It derives from its commitment in the National Master Freight Agreement not to strike. There is no question that the International neither authorized nor sanctioned the strikes. Nor is there a question that it offered aid or comfort to the strikers. Rather, the issue is simply whether or not it reasonably and fully discharged its implied duty to exercise its powers to endeavor to get the men to go back to work.[18]

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[17] The International's contention that the "disclaimer" which appears at the end of each agreement which states that the International "approved [the agreement] as to form only" and,

> ". . . in doing so [assumed] no liability whatsoever under [the agreement] for the performance thereof or otherwise, and by such approval does not become a party to [it]"

conclusively relieves it of liability under the agreement is unpersuasive. If it is a party through its National Committee, any formal disclaimers are mere ineffectual contrivances.

[18] It is to be noted that the International's obligation, like Local 249's, is to undertake the means available to return its members to work. The obligation is not discretionary, but mandatory. Therefore it leaves no latitude for political or even good faith judgments as to what might and what might not be productive. The obligation is literally to employ "every reasonable means" to end "wildcat" strikes.

On August 21, 1968, immediately upon learning of the strikes, Frank Fitzsimmons, vice-president of the International, sent telegrams to Thomas Fagan and John Angelo (an officer of Local 377) which declared the strikes to be illegal and instructed them to return their men to work. Further, on August 21, Norman Kegel, an International organizer, went to the picket line at Eazor's Pittsburgh terminal and urged the men there to return to work. Other officials of the International were dispatched, including Presser to Local 377 and Albert Dietrich and William Neidig to Local 249, to assist the beleaguered local officials and at least Dietrich spoke to the striking members of Local 249 at the meeting of September 15. Two International officers, Walter Shea and Robert Flynn, testified that from the inception of the strikes the International was in contact with officials of the striking locals on almost a daily basis. These largely conciliatory efforts of the International culminated in a meeting at the International's offices in Washington, D. C., on September 17, at which the "riot act" was read to the strikers' leaders.

In light of its obligation, and of the gravity and endurance of the strikes, the International's undertakings to induce the strikers to return to their job were veritably negligible. The range of sources of persuasion available to it were fairly vast. Short of placing either of the locals in trusteeship, it could have directly threatened the strikers with fines, suspension or expulsion; it could have proceeded to impose fines, suspensions or expulsions (and have expedited such proceedings); it could have acted sooner in sending International representatives to urge the dissidents to step aside to allow the men to return to work. Further, those representatives who were sent could have

urged the return of the men to work in more forceful, uncompromising terms.

Additionally, it could have called a meeting of the leaders of the strikers in its Washington offices far sooner than almost one month after the strikes began, and it could have directed a vote of the strikers by secret ballot. Indeed, it was with the occurrence of these latter two events that the strike was brought to an end. In sum, then, the restraint with which the International went about making efforts to break the strikes, in the face of the urgency of the need for strong, unmistakably intended measures, I think compels the conclusion that the International, like Locals 377 and 249, breached its contractual obligation to the plaintiff to deplete, if necessary, its arsenal of all available means to halt the strikes.

An Order will be entered imposing liability on all three defendants, and the trial of these actions will proceed to the second phase, i.e., that of the issues of damages, including mitigation of damages, if any.

* * * * * * * * * * *

Order

And Now, to wit, this 30th day of March, 1973, in consideration of the foregoing Opinion, It Is Ordered that judgment as to liability only be and the same hereby is entered for the plaintiffs, Eazor Express, Inc. and Daniels Motor Freight, Inc. and against the defendants, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and its locals, Local 249 and Local 377.

It Is Further Ordered that the damage phase of this action shall commence on Monday, May 7, 1973 at 2:00 P.M. in Court Room No. 12, 10th Floor, United States Post Office and Courthouse.

/s/ Hubert I. Teitelbaum
Hubert I. Teitelbaum
United States District Judge

APPENDIX B

Opinion of District Court on Damages (June 10, 1974)

UNITED STATES DISTRICT COURT, W. D. PENNSYLVANIA

Civ. A. Nos. 68-1014, 69-1235

June 10, 1974.

Eazor Express, Inc., a corporation, *Plaintiff*,

v.

The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 249, *Defendants.*

Daniels Motor Freight, Inc., and Eazor Express, Inc., *Plaintiffs*,

v.

Local 377, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, *Defendants.*

Opinion

Teitelbaum, District Judge.

In Eazor Express, Inc. v. Teamsters, et al., 357 F.Supp. 158 (W.D.Pa.1973), I found the defendant local unions and the defendant International liable under Section 301 of the Labor-Management Relations Act (LMRA) (29 U.S.C. § 185 et seq.) for a work stoppage against plaintiff trucking company which lasted from August 20 until September 25, 1968. Although it was specifically found that neither the locals nor the International had authorized or ratified the wildcat strike, the unions were held liable for failing to perform according to their obligation to use all reasonable means at their disposal, both persua-

sive and punitive, to terminate the work stoppage.[1] Such an obligation was implied from the existence of a "no-strike" clause in the collective bargaining agreement between the parties.

The action had been bifurcated as to the issues of liability and damages and the above-cited Opinion dealt only with the issue of liability. In this Opinion, after a lengthy

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[1] In the first Opinion, I declined to premise defendant's liability on a "mass action" theory of union liability for wildcat strikes. See Section 301(e) of the LMRA and U.M.W. v. U.S., 177 F.2d 29 (D.C. Cir.), cert. denied, 338 U.S. 871, 70 S.Ct. 140, 94 L.Ed. 535 (1949). In light of the specific contractual provision in the agreement denying union liability for "unauthorized" acts, I felt that to apply the mass action theory "would be to not only negate but rewrite [the collective bargaining agreement's] express provision to the contrary." 357 F.Supp. at 163, n. 7. My reasoning in this regard has been adopted by Judge Edward R. Becker of the Eastern District of Pennsylvania in Adley Express Co. v. Highway Truck Drivers & Helpers Local, 365 F.Supp. 769, 778, n. 8 (E.D. Pa. 1973). Once it is understood that the fundamental underlying assumption of the Opinion on liability was regard for what may be called the sanctity of contracts (stated simply, if the union agrees not to strike in a signed contract, it should do everything within its power to prevent or terminate a strike should one occur), my disinclination to rewrite the parties' agreement becomes clear. Nevertheless, it is possible to reconcile the two approaches and view the mass action doctrine as an alternative basis for liability in this case. Recognizing that the seeming conflict between the two approaches turns on the interpretation of the word "authorized"; if an authorized strike is interpreted to mean one in which union officials acquiesce and/or one which they fail to terminate by use of the reasonable means at their disposal, the defendants here are equally and alternatively liable under the mass action doctrine. Admittedly, my original interpretation of "unauthorized" in the collective bargaining agreement assumed that only those acts officially and formally sanctioned by union officials could be authorized, but further analysis leads to the realization that nothing precludes the above interpretation. See in this regard Wagner Electric Co. v. Local 1104, 361 F.Supp. 647 (E.D. Mo. 1973) and the excellent case note at 26 Vand. L. Rev. 1331 (1973).

hearing on the question and the submission of briefs by the parties, I consider the issue of damages.

Unlike a jury, which may award damages without substantiation of its reasons for arriving at a certain amount, the district court in such a situation is obliged to set out the rationale behind its damage awards. In such a case as this, where the weeks of testimony were filled with disputes over the intricate mysteries of accounting techniques, to set out in exhaustive detail the step-by-step financial contentions of either side would be a task of Augean[2] dimensions. Rather, I will proceed by setting out those broader principles to which I have adhered in a comprehensive examination of the minutiae of the parties' claims.

I recognize that damages, in a case such as this, can neither be proved nor found with precision. The party seeking damages must prove that the conduct which imposes liability upon another was a material cause of injury to the business or property of the claimant. Then, once the fact of injury is established, the trier of fact may make a reasonable estimate of damages. I distinguish between proof of the fact of damages and proof of the amount of damages. It seems to me that any other approach would work an injustice. For a clear and concise expression of this approach in a different context, see the Opinion of Judge Van Dusen in Edward C. Rea and 22 Ford Inc. v. Ford Motor Co., 497 F.2d 577, Third Circuit Court of Appeals filed April 26, 1974.

The fundamental rule to which I have adhered in awarding damages is the basic contract rule of Hadley v. Baxendale, 156 Eng. Rep. 145 (1854): damages are recoverable only for those injuries that may be shown to have been within the contemplation of the defendant as occurr-

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[2] An Augean task is one which is extremely difficult; a task reminiscent of Hercules' labor in cleaning the immense stables of King Augeas of Elis, which had not been cleaned for thirty years.

ing as a probable result of its breach. The foreseeability test is not, of course, to be taken literally: it does not mean that if the defendant contends that he was unable to predict that in the future what did happen would happen, the plaintiff should leave empty-handed. Rather, foreseeability is but a shorthand legal expression for the ascertainment of that *sine qua non* of all legal judgments, proximate cause, by means of hindsight. As stated in Corbin on Contracts, Vol. 5, § 1007, the foreseeability test is "the only substantial test of the legal requirements as to proximate causation and remoteness". Id. at 71.

John Stuart Mill described the cause of an event as the sum total of its antecedents, and in the ultimate, metaphysical sense his axiom is indisputable. But the law, with neither the inclination nor the infinite resources necessary for such weighty contemplations, cannot be concerned with ultimate causes. The very cornerstone of Anglo-American civil law is the principle that no person may recover except for an injury proximately caused by another.

Nor can there be any doubt that foreseeability is the test to be applied in the context of a Section 301 action for damages such as this. As stated in Wilson & Co. v. United Packinghouse Workers, 181 F.Supp. 809 (N.D.Iowa 1960):

> "In an action against a union under Section 301 for damages caused by a breach of a no-strike provision in a contract, the measure of damages recoverable is *the actual loss sustained by the plaintiff as a direct result of the breach.* U. E. W. v. Oliver Corp., 8th Cir., 1953, 205 F.2d 376, 388. Such loss would be that which may reasonably and fairly be considered as arising naturally from the particular breach of contract involved *and which may reasonably be supposed to have been in the contemplation of the parties at the time the agreement was entered into . . . .*" Id. at 820-821. (Emphasis added.)

In short, because a collective bargaining agreement is a contract and enforceable as such, the traditional criteria for the ascertainment of damages where a contract has been breached—foreseeability and proximate cause—are applicable. Williston on Contracts (3d ed. 1968) §§ 1020A and 1362.

I have taken pains to point this out for two reasons: first, because foreseeability and proximate cause are the fundamental tenets which I have borne in mind throughout my consideration of the question of damages in this case; and second, because repeatedly the parties seem to have lost sight of these principles in making their contentions before the Court. Both sides are equally guilty of this basic misconception of the theory of the lawsuit, but plaintiff's unfounded contention that "this case will not accomplish what it should accomplish unless the finding on liability is accompanied by a substantial damage award" is illustrative. In the first place, it would be plainly improper for this Court or any other to weight its damage award in a Section 301 action in one direction or another on the basis of some public policy it wished to further or deter. Moreover, what are sought here, as they must be under the terms of the LMRA are compensatory, not punitive damages. Int. Brotherhood of Teamsters v. Morton, 377 U.S. 252, 84 S.Ct. 1253, 12 L.Ed.2d 280 (1964). This Court has based its damage award on the sole permissible standard for the award of damages in a Section 301 action —foreseeability and proximate cause. The remainder of the Opinion is constructed to exemplify the application of the Hadley v. Baxendale principle to the facts before the Court.[3]

The strike against Eazor took place in the period from August 20 until September 25, 1968. Primarily, it is for

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[3] In accordance with F.R. Civ. P. 52(a), the foregoing shall constitute the Court's finding of fact and conclusions of law in this case.

losses sustained during this period that plaintiff seeks to recover. For the year 1968 Eazor lost, according to the figures of the Interstate Commerce Commission, $296,-000.00. But an analysis of the plaintiff's books and records shows that the company had done fairly well in the first two quarters of 1968, and had in fact made a profit. Thus, the $296,000.00 figure is somewhat misleading, since the loss in the strike period was set off against and reduced by the profit made earlier in the year. Plaintiff submits and this Court finds that during the period August 20 to September 25, 1968, Eazor lost a total of $1,079,332.00. It is this figure which will be used as a starting point for the discussion of plaintiff's losses.

It should be noted at the outset that plaintiff seeks to be compensated for lost profits in this action as well as for the actual losses it sustained. Theoretically, the plaintiff's right to do so is unquestionable. If, in a hypothetical instance, it were to be shown that as the direct result of an illegal strike a company had lost $50,000.00 during a certain period and moreover had been deprived of the $50,000.00 in profits it would have made during that period, the correct measure of damages in such an instance would be $100,000.00. This case however does not present such an instance.

This case is comparable to the contrasting hypothetical situation wherein a company, damaged as the result of an illegal strike, demonstrates that it lost $50,000.00 during the period of the strike, but convincing evidence is introduced to show that the company would have lost $25,000.00 during that period under normal business conditions. Clearly, the proper measure of damages in the latter situation would be $25,000.00 and lost profits would not be includible as an item of compensation.

Here, as in the second example, plaintiff has failed to demonstrate that it would have made a profit during the relevant period and this Court finds that it would not have.

Without such conclusive proof, lost profits are not compensable. In addition, plaintiff seeks to recover what it terms "consequential losses". The company seeks to recover for these consequential losses both as a separate item of damages and as an aspect of its lost profits claim. That is, plaintiff contends that the consequential losses primarily took the form of lost business and asks the Court to infer that had that business "lost" been regained, the company would have made a profit. This Court finds that neither aspect of the consequential losses claim is compensable in this case. Plaintiff has failed to carry his burden of proof that (a) the consequential losses for the years 1969 and 1970 were proximately caused by the August/September 1968 work stoppage [4] or (b) that the company would have made a profit, absent the strike, in 1968, 1969 or 1970.

The evidence which is most illustrative of the reasoning behind the Court's findings in the Eazor firm's own language in its reports to its stockholders on a quarterly and annual basis. The Eazor shareholder reports succinctly document the Court's findings. Stated positively, the losses the company sustained in 1969 and 1970 were due to numerous causative factors other than the 1968 strike. Stated

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[4] A portion of Eazor's one-million dollar plus claim for consequential losses is made up of a claim for $263,702.00 in interest expense. The undeniable remoteness of this item in terms of causation is illustrative of the plaintiff's failure to demonstrate that any portion of its consequential losses claim was caused by the strike. In August of 1970, two years after the strike, Eazor's prime lender refused to extend credit to the company and Eazor was forced to seek out another bank. At the second bank, the company agreed to pay interest at a rate 9% above prime, whereas at the time of the strike its original bank had charged only ½% above prime. It is patently clear that to award the company the interest differential it seeks would be to allow it to recover for the most remote, conjectural and speculative of losses sustained. Simply because a loss occurred after the strike does not necessarily mean it was caused by the strike. Plaintiff has failed to prove which, if any, post-strike losses were caused by the strike.

negatively, this Court finds that plaintiff has failed to sustain its burden of showing that any losses other than those sustained during August and September of 1968 were caused by the strike.[5]

In the first two quarterly reports for the year 1968, Eazor reported substantial sales increases and in both reports expressly attributed this auspicious financial development to the integration of their operations with those of the recently acquired Daniels Motor Freight Company. The quarterly report for the three-month period ending September 30, 1968, the period which included the work stoppage, reads in relevant part as follows:

> "To Our Fellow Stockholders:
>
> Sales in the third quarter of this year increased $1,441,109 and in the first nine months $10,822,363. This increase is attributed to the acquisition of Daniels Motor Freight, Inc., plus growth in our other areas.
>
> Unfortunately we suffered an illegal strike lasting from August 20th to September 25th which started with our Daniels drivers and was very costly to your

[5] The findings that (1) no loss incurred after the end of calendar year 1968 is attributable to the strike and that (2) the losses sustained by Eazor during 1969 and 1970 were due to numerous causative factors are further borne out by Eazor's own statements in a brief submitted to the Internal Revenue Service in the summer of 1970:

> "While Eazor Express, Inc. showed increasing profits for many years, it must be made quite clear that this trend peaked out in 1965 . . . [T]here had been a *drastic downward trend in earnings starting in 1966*. . . . The point we are trying to make here is that Eazor's ability to generate profits began to deteriorate well before [October 1967].
>
> In fact, following the trend through, *we are certain that Eazor . . . would have experienced a sizable loss in 1968 even without the burden of the strike in the fall* of that year, and had Daniels not been acquired." (Emphasis added.)

> company, resulting in a deficit of $722,516 for the third quarter and $552,507 for the nine months.
>
> In order to protect our stockholders, our customers and our employees from possible recurrent, unauthorized work stoppages at any interval in the future, *we could not settle grievances by any procedure other than the procedure in the union contract and we did not. . . .*[6]
>
> Through the courts we were successful in obtaining injunctions and restraining orders against picketing. Prior to the strike we had two break-bulk terminals, one at Daniels at Warren, Ohio, and the other at Eazor Express, Pittsburgh where miscellaneous shipments were reloaded on trailers going to ultimate destination terminals. It was our intent to gradually phase out Warren both as an economy move and to improve service to our customers. The illegal strike hastened this and Warren is now closed, eliminating the lengthy delay of going through the various steps in the contract. . . .[7] We will not tolerate unauthorized strikes and we believe the closing of the Warren terminal will eliminate this problem in the future.
>
> *Our operations quickly returned to normal when we went back to work and we have regained all of our customers. . . .*"[8]

[6] See pp. 849-851, *infra*.

[7] This statement is illustrative of a point fully substantiated in the record that, contrary to plaintiff's assertions, the effects of the strike were not solely deleterious but, as in this instance, beneficial, resulting in financial and operating benefits to the company.

[8] This statement is of course directly contrary to plaintiff's attempted assertion that it not only lost business as a result of the strike but lost such business irrevocably. Eazor presented one witness in this regard whose testimony was inconclusive at best. I find expressly that plaintiff did not lose business and/or profits as a result of the strike. See pp. 7-8, *supra*.

The 1968 annual report essentially repeats the above assertions in less detail, without contradiction of anything in the 1968 third quarter report. The first quarter report for the period ending March 31, 1969, the fiscal period immediately following the strike, reads in pertinent part as follows:

> "To Our Fellow Stockholders:
>
> Sales in the first three months of 1969 decreased $625,276 over the same period last year due to the serious decline in our traffic caused by the east coast pier strike. Severe winter weather in the New England, New York and New Jersey areas also contributed to this unfavorable showing. Some roads were impassable, seriously affecting our operations, and one of our terminals had to remain closed for a few days until snow could be cleared from roads in the area. . . ."

Significantly, the August/September 1968 work stoppage is not even mentioned as a cause of the loss occasioned during the first post-strike fiscal period. Nor is any mention made of any continuing after-effects of the strike in any Eazor shareholder report therafter except for that in the September 30, 1969 quarterly report when the results for the two years are compared, and that in the 1969 annual report where the 1968 strike is listed along with the tight money market, rising interest rates and equipment defects as *one of* the causes for the firm's loss in that year. Plaintiff's own stockholders' reports substantiate this Court's finding that no loss incurred by Eazor after the end of calendar year 1968 has been shown by a fair preponderance of the evidence to be attributable to the strike.

Starting Point for Damages

As stated above, the $1,079,332.00 figure provides the starting point for the Court in its computation of damages. The problem with computing damages in a Section 301 action, as any district court judge who has wrestled with

the problem will attest, is simply that damages in such a context are not susceptible of proof with mathematical exactitude. By the same token, neither are they susceptible of disproof with precision. The court is left to fashion a damage award according to its sound judgment after application of the relevant legal principles. The difficulty of this process is highlighted when two specific problems—the starting date of defendants' liability and mitigation of damages are discussed. The liability of the defendant unions was based primarily[9] upon the failure of Locals 377 and 249 and the International to deplete their "arsenal of all available means to halt the strikes". 357 F.Supp. at 169. Defendants argue, with persuasive effect, that a necessary correlate of this basis of liability is that there must be some time lag between the inception of the strike and the point at which they were called upon (and failed) to exert all reasonable efforts to end the strike. I agree. The primary basis for defendants' liability is therefore amplified to recognize the obvious fact that the leaders of the three defendant unions could not have been required to bring forth their most potent weapons immediately upon notification of the strike. In such a situation it is reasonable to assume, as the union defendants no doubt did assume at the time, that the "persuasive" measures taken upon being notified of the outbreak of the strike (informing the strikers of the illegality of the walkout and urging them, without calling into play effective sanctions, to return to work) would be effective in ending the strike. Thereafter, a certain period of time, which the Court is willing to set in this fact situation but which it does not wish to have interpreted as an ironclad rule under all circumstances, must be allowed to pass in order to permit union leaders to ascertain whether or not their diplomacy has been effective. When the point is reached where it would become obvious to reasonable men that their persuasive efforts had failed, then defendants were required to escalate their response to include those more forceful actions listed in the previous Opinion.

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[9] See footnote 1, *supra*.

Having recognized that a differentiation should exist between the start of the strike and the beginning of defendants' liability, it becomes necessary to resolve two problems which arise as a result of that decision. The first question is whether, under this state of facts, there is any difference as between the three defendant unions as to the starting point of liability. Analysis of the Court's findings of fact as to when each respective union entity was informed of the wildcat strike and as to when each began to take action (357 F.Supp. at 165-169) establishes that the answer to this question must be no. The latest that any union official with responsibility in this matter learned of the strike was the morning of August 21, 1968, picket lines having been established the previous day. Thereupon, the actions taken almost immediately by the officials of Local 377 and Local 249 and by officials of the International were virtually indistinguishable. Each entity informed those within its charge of the illegality of their action and urged the men to return to work. Within a certain period of time it was, or should have been, patently obvious to officials of each of the union entities that resort to "the politics of persuasion" had been unavailing.

The second problem is ascertainment of the length of time in which it should have become obvious that halfway measures had failed. I have inferred such a time period from the evidence on the record. Since I am aware that such a time differential must be expressed in mathematical terms in order to facilitate the formulation of damages, I have determined that, under the facts of this case, such a period extended for forty-eight hours.[10] Assuming that

[10] The risk which arises from traveling such a course is that setting of a specific time period will be taken for something other than what it is, an inference drawn from the exhibited actions of defendants under all the facts and circumstances of this specific case. The risk is that it will be taken for a rule which states that if, within 48 hours after the start of the strike, the first efforts of union officials to end an unauthorized work stoppage have not borne fruit, those officials who fail to take more forceful measures to end the strike will be held liable in damages. Nothing could be further from my mind than setting such a rule. The conduct of human affairs in general, and labor relations in particular, are not activities which may be divided into segments, computerized and set out onto timetables. Individual judgment by responsible leaders and the freedom of those in authority to pursue reasonable alternative courses of action must be preserved.

each day of the 36-day strike accounted for a proportionate increase in damages, I have reduced the measure of damages accordingly.

MITIGATION OF DAMAGES

According to the Restatement of Contracts, § 336:

> "Damages are not recoverable for harm that the plaintiff should have foreseen and could have avoided by reasonable effort without undue risk, expense, or humiliation."

In keeping with this fundamental principle of contract law, once a breach of the contract, the strike, occurred, Eazor had an obligation to take reasonable steps to mitigate damages flowing from the breach and to refrain from any action which would aggravate an already exacerbated situation and increase the measure of damages. Williston on Contracts, (3d ed. 1968), § 1353. This Court finds that Eazor did not comport itself in accordance with that legal standard and therefore reduces the measure of damages accordingly.

Bearing in mind that in a hard-nosed business, a hard-nosed attitude on the part of management is often thought necessary, this Court cannot sanction Eazor's behavior in failing to take any effective steps whatsoever to hasten an end to the strike. A tough-minded attitude toward labor negotiations is one thing; the complete absence of any evidence of a flexible spirit of conciliation and compromise is quite another. The evidence shows that once a strike had gone on for some time, Eazor failed to exhibit even that modicum of reasonableness necessary for achieving labor peace.

On September 3, 1968, when the strike had been in effect for two weeks, representatives of the unions met with Eazor representatives in an effort to settle the strike. The September 3 meeting was held at the urging of the Honorable Thomas D. Lambros, United States District Judge for the Northern District of Ohio. The unions sought to have the striking employees return to work and to submit to arbitration the question of whether Roper and Eckley, the strike leaders whose discharge had triggered the strike, had been properly discharged, along with the underlying questions of work rules and conditions. Eazor took the position that the fate of the discharged employees was non-negotiable until all employees who had not been discharged[11] returned to work. Thereafter, the situation deteriorated and the strike continued for three more weeks.

On September 9, Eazor discharged five more employees, the shop stewards and committeemen of Local 249. On that same date, Eazor proposed that all remaining employees, not including those it proposed to put on a three-month suspension, return to work with the same condition attached—that the status of discharged employees was final and not subject to arbitration. The unions refused to accept this solution. On September 17, Eazor discharged seventeen more Local 377 employee members and permanently closed its Warren terminal.

This scenario is not meant to stand as a blanket condemnation of Eazor's bargaining stance which in and of itself amounts to a failure to mitigate damages. As stated in In Re Kellett Aircraft, 186 F.2d 197 (3d Cir. 1950):

> "Whether or not the buyer's obligation to mitigate damages has been discharged depends on the reasonableness of its conduct. In this connection, reasonable conduct is to be determined from all the facts and

[11] On August 22nd and 23rd, twenty-six Eazor employees had been discharged for their participation in the unauthorized work stoppage.

> circumstances of each case, and must be judged in the light of one viewing the situation at the time the problem was presented. Where a choice has been required between two reasonable courses, the person whose wrong forced the choice cannot complain that one rather than the other was chosen. The rule of mitigation of damages may not be invoked by a contract breaker as a basis for hypercritical examination of the injured party, or merely for the purpose of showing that the injured person might have taken steps which seemed wiser or would have been more advantageous to the defaulter. One is not obligated to exalt the interest of the defaulter to his own probable detriment." Id. at 198-199.

This Court finds, under all the facts and circumstances of this case, that plaintiff failed to mitigate damages. Such a finding does not center solely upon plaintiff's discharge of striking employees, for plaintiff's rights in that regard are specifically defined in the law (see N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381 (1938)) and in the contract between the parties. On the other hand, it must be noted that Eazor's continued adherence to a hard-line course of retribution and obstinacy might well have been foreseen to achieve nothing more than what it did achieve—a strengthening of the feeling of solidarity which already motivated the workers.

Nor does the finding of failure to mitigate damages center solely upon Eazor's refusal to accept the unions' September 3 settlement proposal. As pointed out in In Re Kellett Aircraft, no one can say with certainty, even in hindsight, what course of action was best for plaintiff's interests at the time. But it can be said with certainty, and this Court so finds, that acceptance of the unions' September 3 settlement proposal and/or refraining from discharging any or all striking employees would have been reasonable efforts on plaintiff's part which would not have caused plaintiff undue risk, expense or humiliation. Once the

strike had been ongoing for some time, it was the responsibility of *both* parties to earnestly seek resolution of their difficulties.

In addition to the reduction in damages for failure to mitigate damages and in keeping with setting a reasonable starting point for damages, there is one specific item of damages which plaintiff has failed to prove was proximately caused by the strike, and thus an item for which he may not be compensated—legal expense. In computing its estimate of Eazor's operating loss for August/September 1968, plaintiff includes an item for $52,108.00 in legal expenses. While it is true that legal expenses which directly relate to terminating a work stoppage, as opposed to those which relate to seeking damages sustained as a consequence of such work stoppage, are recoverable (Sheet Metal Workers, Local 223 v. Atlas Sheet Metal Co., 384 F.2d 101, 110 (9th Cir. 1967)), plaintiff has failed to sustain its burden of proving what portion, if any, of the legal expenses it incurred were directly related to ending the strike. To base an award of attorney's fees in a Section 301 action upon plaintiff's unsubstantiated submission of its bills from counsel would be impermissible speculation.

Thus, starting from a base of $1,079,332.00, the demonstrated loss for August and September of 1968, I subtract $52,108.00, to yield a figure of $1,027,224.00. Next, the amount of damages attributable to that initial period during which defendants' duty to exhaust all reasonable efforts toward ending the strike had not yet been activated must be subtracted. Assuming that defendants' duty was not activated until a maximum period of 48 hours had passed, the amount to be subtracted may be expressed as 2/36 of the whole, since the work stoppage lasted a total of 36 days. Expressed as a percentage, 2/36 equals .056. Thus, subtracting $57,524.54 (.056 x $1,027,224.00) from the total damages mathematically accounts for that period in which defendants' duty to exhaust all reasonable efforts had not

yet arisen. The result of such computation yields damages in the amount of $969,699.46.

I find that only .528 of the above figure or $512,001.32 is due plaintiff as compensatory damages. This proportion is arrived at by taking September 9, 1968, the date on which plaintiff responded to defendants' settlement offer, as the final point for plaintiff's damages. On September 9, the strike was 19 days old and .528 is the percentage expression of 19/36. After September 9, 1968, I find that plaintiff's failure to mitigate damages was the cause of any harm done to the company.

I find further, on the basis of the percentage breakdowns submitted by plaintiff, that Local 249 is liable for 63.5% of this amount or $325,120.84, and that Local 377 is liable for 36.5% of the total or $186,880.48. These figures reflect the proportion of damage incurred by Eazor and Daniels respectively, considered as separate entities, as a result of the strike. Since there are two separate contracts involved in this case, one between Eazor and Local 249 plus the International and one between Daniels and Local 377 plus the International, neither local can incur liability for breach of the other local's contract. Thus, Local 249 is liable only for damages caused by breach of the contract with Eazor and Local 377 is liable only for damages caused by its breach of the contract with Daniels.

The International of course was under contractual agreement with both Daniels and Eazor simultaneously and has been found, in the Opinion on liability, to have been in breach of its contractual obligations. The International and Local 249 were bound jointly on the contract with Eazor and the International was bound jointly with Local 377 on the contract with Daniels. Thus, the International's liability for $512,001.32 is joint and several with that of the two locals.

An appropriate Order in accordance with this Opinion shall be entered.

APPENDIX C

Order of District Court on Damages (June 10, 1974)

Order

AND Now, to wit, this 10th day of June, 1974, in accordance with the foregoing Opinion in the above-captioned case, IT IS ORDERED that judgment is entered in favor of plaintiff and against defendant Local 249 and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America jointly in the amount of $325,120.84 and that judgment is entered in favor of plaintiff and against defendant Local 377 and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America jointly in the amount of $186,880.48. Both amounts are to include interest at the rate of 6% per annum from September 25, 1968 until June 10, 1974.

/s/ HUBERT I. TEITELBAUM
Hubert I. Teitelbaum
United States District Judge

APPENDIX D

Opinion of Court of Appeals (July 31, 1975)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 74-1759, 74-1760, 74-1761, 74-1762

EAZOR EXPRESS, INC. and DANIELS MOTOR FREIGHT, INC.,
Appellants

v.

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA: INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION No. 249; and LOCAL 377 INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Cross-appellants*

(District Court Civil Actions 68-1014 and 69-1235 consolidated)

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued April 29, 1975

Before MARIS, VAN DUSEN and GARTH, *Circuit Judges*

OPINION OF THE COURT

(Filed July 31, 1975)

By MARIS, *Circuit Judge*

Before us for decision are appeals by both the plaintiffs and the defendants hereinafter named from a final judgment entered by the United States District Court for the Western District of Pennsylvania in two consolidated civil actions brought under § 301 of the Labor Management Relations Act. 29 U.S.C.A. § 185. One of the suits was brought by Daniels Motor Freight, Inc. (herein "Daniels") and Eazor Express, Inc. (herein "Eazor") as plaintiffs, against the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein the "Teamsters International Union") and its Local Union No. 377 (herein "Local 377"), as well as against certain individuals not involved in these appeals, as defendants, and was originally filed in the Court of Common Pleas of Trumbull County at Warren, Ohio, promptly removed by the defendants to the United States District Court for the Northern District of Ohio, and subsequently transferred by the latter court to the District Court for the Western District of Pennsylvania. The other suit was brought by Eazor, as plaintiff, against the Teamsters International Union and its Local Union No. 249 (herein "Local 249"), as well as against certain other labor organizations not involved in these appeals, as defendants, and was filed in the District Court for the Western District of Pennsylvania. The suit brought originally in Ohio sought both injunctive relief and damages for losses alleged to have been suffered by the plaintiffs as the result of an unauthorized strike by certain of plaintiffs' employees who were members of Local 377. The suit brought in the Western District of Pennsylvania sought only damages for the losses alleged to have been suffered as the result of an unauthorized strike by certain of plaintiffs' employees who

were members of Local 249. By order of the district court the actions were consolidated as a single action for trial and they will be treated as a single case for the purposes of our discussion.

The facts out of which the controversy arose may be summarized as follows. The unauthorized strikes giving rise to the litigation took place from August 20 to September 17, 1968 at Warren, Ohio and from August 21 to September 24, 1968 at Pittsburgh. Eazor and Daniels were both motor freight carriers, Eazor having a breakbulk commodities terminal in Pittsburgh and Daniels having a breakbulk terminal in Warren, Ohio. Prior to 1968 Eazor contracted to purchase all the stock of Daniels and during that year Eazor operated the Daniels business pursuant to an interim order of the Interstate Commerce Commission. Final approval of Eazor's acquisition of the Daniels stock was given by the Commission in 1970 and Daniels was actually merged into Eazor in 1972.

In 1968 the drivers and dock workers at Eazor's Pittsburgh terminal were members of Local 249 of the Teamsters International Union and the drivers, dock workers and garage employees at the Daniels terminal in Warren were members of Local 377 of that union. Eazor, Daniels, Local 249 and Local 377 were parties to the National Master Freight Agreement which was in force between April 1, 1967 and March 31, 1970. This agreement had been entered into between the National Over-the-Road and City Cartage Policy and Negotiating Committee (herein the "National Union Committee") of the Teamsters International Union and a corporation known as Trucking Employers, Inc., representing Eazor, Daniels and most other American motor freight carriers. To this master agreement there were various regional supplements binding upon certain employers and local unions. The Teamsters Joint Council No. 40 Freight Division Over-the-Road Supplemental Agreement and the Teamsters Joint Council No. 40 Freight Division Local Cartage Supplemental Agreement were the

supplements binding on Eazor and Local 249. The Central States Area Over-the-Road Motor Freight Supplement with Ohio rider and the Central States Area Local Cartage Supplemental Agreement bound Daniels and Local 377. The district court held that the National Master Freight Agreement and its supplements also bound the Teamsters International Union, a disputed question in the case which we shall discuss later.

The supplemental agreements each contained substantially the following no-strike clause:

> "The Unions[1] and the Employers agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of settlement, as provided for in this Agreement, [and in the National Agreement, if applicable,[2]] of any controversy which might arise."

On August 17, 1968 Daniels discharged Roper, a garage employee and member of Local 377, and on August 19th Eckley, a road driver employee and union member, each for refusal of a work assignment. On the morning of August 20th meetings were held in Daniels' Warren terminal to attempt to resolve the grievances of Roper and Eckley arising from the termination of their employment. In attendance, among others, were Roper, Eckley, O'Neill, Vice-President and business agent of Local 377, and Clark, the terminal manager for Daniels. The meetings proved fruitless and in the afternoon Roper and Eckley began picketing the terminal. The members of Local 377 then walked off their jobs and the strike at Warren began. The next morning, August 21st, members of Local 377 from Warren appeared at the Eazor terminal in Pittsburgh and established a picket line there which the members of Local 249 employed by Eazor thereupon refused to cross.

1. In the Central States Area Over-the-Road Motor Freight Supplement the word "Unions" at this point appears as "Union", apparently as the result of a typographical error.

2. The bracketed clause appears only in the two supplemental agreements to which Local 377 was a party.

It is conceded by all parties that Roper and Eckley did not exhaust the grievance procedure provided by the agreement and supplements in force between Local 377 and Daniels and that the strikes which began in Warren on August 20th and in Pittsburgh on August 21st were unauthorized by the unions and in direct violation of the no-strike clauses of the supplements to the National Master Freight Agreement to which they were parties. However, the local union stewards and committeemen at the Warren and Pittsburgh terminals took no steps to dissuade their fellow employees from striking or to induce them to return to work. On the contrary, they not only aided and abetted them but openly organized the strikes and led their members in conducting them.

The position of the unions, particularly Local 377, with respect to the strikes is less clear. There is no doubt that officers of the two local unions and of the Teamsters International Union repeatedly characterized the strikes as unauthorized and illegal and made a series of appeals, both written and verbal, to their striking members to return to work. Such appeals were made by O'Neill, the Vice-President and business agent of Local 377, among others, but the evidence is conflicting as to whether in fact O'Neill did not at the outset direct, or at least encourage, the walkout at Warren on August 20th. The district court found as a fact, however, that he had not done so, a finding which the plaintiffs assert was clearly erroneous and which we shall discuss later. It does not appear, however, that the unions took any action seeking to terminate the strikes more drastic or compelling than written and verbal urging of their members to return to work. No steps whatever were taken to remove or restrain the local union officers at the terminals, the stewards and committeemen, who were leading the strikers.

The strikes were characterized by an accelerating pattern of violence which persisted, despite efforts to enforce injunctions issued by the Court of Common Pleas at

Pittsburgh[3] and the United States District Court at Cleveland[4] to control it. The violence included commandeering on the highway plaintiffs' drivers not involved in the strikes and compelling them to abandon their equipment, large scale destruction of Eazor equipment, threats of violence, and shootings and, finally, on September 16th an open assault by hundreds of persons on a convoy of Eazor trucks operated from the Pittsburgh terminal under police protection pursuant to a specific order of the Court of Common Pleas. Eleven of these persons, all members of Local 249, were arrested, convicted and imprisoned for criminal contempt by the Court of Common Pleas.

Within two or three days of the commencement of the strike at Warren, Daniels discharged Eugene Martin, the road steward, Bates, the city driver steward, and Merlin Martin and Arnold, union committeemen, and 26 other employees. On September 3d, urged by Judge Lambros, who was conducting the proceedings for a preliminary injunction in the United States District Court in Cleveland, the parties met to attempt a settlement of the strike. The union officials proposed that Daniels permit all the employees to return to work without penalty including Roper and Eckley whose reinstatement would be subject to determination through the grievance procedure. Daniels rejected this offer and indicated that it was unwilling to negotiate the status of the discharged employees until the employees not discharged returned to work. However, the evidence clearly shows that, contrary to the finding of fact by the district court which will be discussed later, shortly after this meeting the plaintiffs offered to reinstate all the Local 377 strikers who had been discharged except Roper, Eckley, the stewards and the committtee-

3. The injunction was issued by the state court on a complaint filed by Eazor in that court.

4. The injunction was issued in that one of these consolidated suits which was originally brought in the Court of Common Pleas of Trumbull County, Ohio and removed to the United States District Court at Cleveland. As we have stated, that suit then sought injunctive relief as well as the damages which are the subject of the judgment here appealed from.

men, but this offer, which was recommended by O'Neill and the striking union members' counsel, was rejected by the strikers at Warren. On the same day Eazor at Pittsburgh discharged Gilmer, the road steward, McLallen, the road committeeman, and Jeffress, a member of Local 249. Daniels and Eazor then sent letters to all striking Local 377 and 249 members, respectively, other than Roper, Eckley, the stewards and the committeemen, offering them the opportunity to return to work without penalty if they returned on September 11th and with a three-day penalty for each day's participation in the strikes if they returned on September 16th. The strikers, however, rejected this offer and on September 17th Daniels sent letters of discharge to 157 striking employees at Warren and permanently closed its terminal there. On September 24th the striking members of Local 249 took a vote, for the first time by secret ballot, and voted to return to work. The next day, September 25th, they went back to work at the Pittsburgh terminal and the strike there was over. The strike at Warren had ended with the permanent closing of the terminal there on September 17th. Following the end of the strike at Pittsburgh, Gilmer, the road steward, McLallen, the road committeeman, and Jeffress, a union member, were permitted to return to work pending the conclusion of grievance procedure. By an arbitral award under that procedure the discharge of Gilmer and McLallen was upheld and that of Jeffress vacated.

The trial was bifurcated by the district court. The issue of the liability of the defendants for damages to compensate the plaintiffs for losses alleged to have been suffered as a result of the strikes was tried first. Following that trial the district court filed an opinion holding that while Local 377, Local 249 and the Teamsters International Union were not responsible for calling the illegal strike, they were, nevertheless, liable for some of its consequences because they breached their contractual obligation to use every reasonable means to terminate it. 1973, 357 F. Supp.

158. Thereafter, the court held a trial on the issue of the amount of damages to be awarded. Extensive evidence on this subject was introduced and will be the subject of later discussion. Following the trial on this issue the court filed an opinion awarding to Eazor $325,120.84 against the Teamsters International Union and Local 249 and to Daniels $186,880.48 against the Teamsters International Union and Local 377. 1974, 376 F. Supp. 841. Asserting that the court erred in excluding from its awards of damages large items of loss which they had proved, the two plaintiffs have appealed in each action. Appeals Nos. 74-1759 and 74-1761. Likewise, the three defendants have appealed in each action, urging that the court erred in imposing liability upon them and in any case in fixing the amount of the award of damages. Appeals Nos. 74-1760 and 74-1762.

We turn now to consider the issues raised by these appeals. The first question to which we address ourselves is raised by the Teamsters International Union which urges that the district court erred in holding that it was a party to the National Master Freight Agreement and its supplements. Those agreements were actually signed by the National Union Committee. The Teamsters International Union argues that in executing the contract the National Union Committee was acting merely as attorney in fact for the local unions. As to this, the district court said:

> "In a technical sense, the International's latter position is unassailable. It was not a signatory to the agreement; rather its 'National Committee' was. The inquiry, then, must be into the relationship between the National Committee, the signatory to the agreements, and the International.
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> "The authority for the National Committee originated with a resolution of the Executive Board of the International. The authority was granted for the purpose of accomplishing national bargaining and national agreements, which were deemed by the Executive Board to be in the best interests of all the members of the International. The actual creation of the National Committee was by way of a resolution of a 'Conference of Representatives' from the International's local unions and joint councils. Finally, the National Committee was activated, at least in form, by virtue of a power of attorney from the International's unions.

> "Notwithstanding the formalities surrounding its creation, the National Committee is intimately associated with the International. At all relevant times its members were appointed by the president of the International pursuant to authorization from the Executive Board; many of its members were contemporaneous members of the International's Executive Board; it was chaired by the president of the International; its funding was controlled by the International; and the International conducts the ratification vote its constitution requires after a national accord with its members' employers is reached. The National Committee has no status or shape as a labor organization independent of the International. It has no constitution or by-laws, and files no reports with the Department of Labor as it would be required to do if it were a labor organization. In short, it is organizationally and functionally an administrative arm of the International. Its sole purpose, to achieve national negotiations and national agreements, furthers the aims of the International. While it may act, in terms of the sophistries, on behalf of the local unions, in terms of the realities, it acts on behalf of the International." 357 F. Supp. at pp. 167, 168.

We fully agree with these conclusions. It is true that after all the signatures on the supplements to the National Master Freight agreement the following appears:

"This Agreement is approved as to form only by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and in doing so the International Union assumes no liability whatsoever under this Agreement for the performance thereof or otherwise, and by such approval does not become a party to the Agreement.

APPROVED:

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Frank E. Fitzsimmons,
General Vice President"

As to this, it is sufficient to say that while it may well be that the Teamsters International Union did not become a party to the Agreement *by executing the foregoing approval as to form,* it is clear that it did become a party through the execution of the Agreement and supplements by its own administrative arm or agency, the National Union Committee. We need only add that we see no merit whatever in the contention of the Teamsters International Union that even though it must be regarded as a party to the agreement and its supplements through the relationship of the National Union Committee to it, the parties did not intend that it should have any obligation under the no-strike clauses in those supplements. The no-strike clauses were the fruit of negotiations between the motor carriers of the country and the International Union acting through its National Union Committee. They were perhaps the most important product of those negotiations so far as the motor carriers were concerned. It is inconceivable that it was not understood by all that by those clauses the International Union, as well as its various subordinate local unions, was undertaking to assure the carriers a period of three years of industrial peace.

As we have indicated in our statement of the facts, all of the supplemental agreements to which the Teamsters International Union and Locals 249 and 377 were parties contained virtually identical no-strike clauses. Under these clauses the unions agreed that there should be no strike against Daniels or Eazor without first using all possible means of settlement as provided by the grievance procedure set out in the agreement and supplements. Admittedly the grievance procedure was not exhausted prior to the strikes with which we are here concerned. The unions urge that these strikes were commenced wholly on the initiative of the plaintiffs' employees, admittedly all members of one or the other of the local unions, and were not authorized or called by the unions or by those officers of the unions who were authorized to take such action. There does not appear to be serious dispute as to this with respect to the Teamsters International Union and Local 249. But the plaintiffs urge that the evidence, fairly considered, established that the strike of Local 377 members at the Daniels terminal at Warren was, in fact, authorized and called by John J. O'Neill, Vice-President and business agent of the local union, who was the union officer authorized to do so. The unions concede that O'Neill did have such authority in Local 377, but assert that the evidence absolves him from any responsibility for calling or authorizing the strike and indicates, on the contrary, that he sought from the beginning to induce the strikers to end it. The issue thus raised was considered by the district court which found as a fact that O'Neill did not call the strike and that, in fact, he cautioned against it. The evidence on this issue was sharply conflicting and involved questions of credibility which were peculiarly for the trial judge to resolve. We have carefully considered that evidence. It would serve no useful purpose to review it in detail. We need merely say that we find ourselves unable to characterize the findings of the district court on this issue as clearly erroneous. The finding that Local 377 did not authorize or call the strike must, accordingly, be affirmed.

The district court held that necessarily implied in the unions' agreement that there should be no strike was an obligation on their part to use every reasonable means to bring to an end a strike begun by their members without their authorization. With this conclusion we agree. As the district court pointed out, collective bargaining agreements such as these impose a continuing day-to-day obligation on the parties to fulfill their terms in good faith. *Curtiss-Wright Corp., Wright Aero. Div. v. NLRB*, 3d Cir. 1965, 347 F.2d 61, 68; *see Conley v. Gibson*, 1957, 355 U.S. 41, 46. This is certainly true with respect to the obligation that there should be no strike pending the use of grievance procedure. Accordingly, in the case of an unauthorized strike against their employer by all the members of a union who are employed by that employer, their union may not disclaim responsibility for the losses suffered by the employer as the result of the strike unless and until it has exhausted all reasonable means within its power to bring that unlawful action to an end. A no-strike agreement would be illusory indeed were a union to be permitted to avoid all responsibility under it for the duration of a prolonged strike which was being carried on by the concerted action of all its members employed in the struck operation, merely because the strike was not initially authorized or called by the union as an organization or by those of its officers who were specially empowered to do so. Rather than to construe a contract as producing such a result, the courts will favor a construction making the mutual promises binding and giving the contract legal effect. 1A *Corbin on Contracts* 8-9; 3 *Corbin on Contracts* 168-171; 17 Am. Jur. 2d 452.

In *Penn Packing Co., Inc. v. Amalgamated Meat Cutters, Local 195*, 3d Cir. 1974, 497 F.2d 888, 891, this court held that by giving a no-strike pledge substantially similar to those here involved the union had committed itself to use its best efforts to end a work stoppage as soon as practicable. In that case we held that it had done so and thereby had discharged its no-strike obligation.

United Construction Workers v. Haislip Baking Co., 4 Cir., 223 F.2d 872, *cert. denied*, 1955, 350 U.S. 847, is urged by the defendants as authority to the contrary. But in that case the collective bargaining agreement did not contain an express no-strike clause and while the court there held that a strike which was begun without following the grievance procedure was necessarily a breach of the agreement for the settlement of grievances by such procedure, it concluded that there was nothing in the contract making the defendant union liable for such an unauthorized strike by its members or requiring that it take any action with regard to it. We do not read the *Haislip* case as authority for the defendants' position here.

It is true, of course, that the courts may not remake the parties' contracts and may declare an implied obligation to exist only when there is a satisfactory basis in the express provisions of the agreements which make it necessary to imply certain duties and obligations in order to effectuate the purposes of the parties. *Kellogg Co. v. NLRB*, 6 Cir., 457 F.2d 519, *cert. denied*, 1972, 409 U.S. 850. To find such an implied obligation in a labor contract is not without precedent, however. Indeed the *Haislip* case, on which the defendants rely, is an example. And the Supreme Court has similarly held, in a case where arbitration was the means chosen by the parties in their contract to settle a labor-management dispute, that an agreement not to strike pending arbitration was necessarily implied and that the union involved which was engaging in a strike during the pendency of the arbitration proceedings was bound by and had breached that implied agreement. *Teamsters Union v. Lucas Flour Co.*, 1962, 369 U.S. 95. The decision was grounded on traditional contract law and "Even more in point", said the Court, on the "basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare." 369 U.S. at p. 105. And see *Amalgamated Meat Cutters & Butcher Workmen of America, Local 195 v. Cross Brothers Meat Packers*, 3 Cir. 1975 F.2d .

The no-strike clauses in the collective bargaining agreements here involved are basic to the agreements. As stated in the Senate report recommending passage of the Labor Management Relations Act, "the chief advantage which an employer can reasonably expect from a collective agreement is assurance of uninterrupted operation during the term of the agreement." S. Rep. No. 105, 80th Cong., 1st Sess. (1947) p. 16. Moreover, the no-strike clauses were binding on the individual union members on whose behalf the unions signed the agreement,[5] as well as on the unions as organizations and on their officers. *NLRB v. Allis-Chalmers Mfg. Co.*, 1967, 388 U.S. 175, 180. It is perfectly clear that the parties, both the unions and their members as well as the employers, intended that during the term of the agreements there should be no strikes or work stoppages pending exhaustion of the grievance procedure.

The unions point to two provisions of the agreements which they contend limit their liability for unauthorized strikes. The first of these is Article 4 of the National Master Freight Agreement which is applicable to both Locals 377 and 249, as well as to the Teamsters International Union, and which contains the following pertinent provisions:

> "Article 4. Stewards
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> . . .
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> "Job Stewards and alternates have no authority to take strike action, or any other action interrupting the Employer's business, except as authorized by official action of the Local Union. The Employer recognizes these limitations upon the authority of job stewards and their alternates, and shall not hold the

5. Although such an agreement is binding on the individual union members, the employer has no action for damages against them individually for their breach of the agreement where the union has been adjudged liable for the damages from the breach. *Atkinson v. Sinclair Refining Co.*, 1962, 370 U.S. 238, 249. Further, it has been held that the employer is in any event without a remedy for damages for breach of contract against individual union members who have engaged in a wildcat strike. *Sinclair Oil Corp. v. Oil, Chemical and Atomic Workers International Union*, 7 Cir. 1971, 452 F.2d 49.

> Union liable for any unauthorized acts. The Employer in so recognizing such limitations shall have the authority to impose proper discipline, including discharge, in the event the shop steward has taken unauthorized strike action, slowdown or work stoppage in violation of this Agreement."

The unions urge that this section of the agreement absolves the unions from any liability for unauthorized strike action. We are satisfied from the context, however, that the phrase at the end of the second sentence "any unauthorized acts" for which the employer may not hold the union responsible refers only to such acts by job stewards and their alternates and does not refer to unauthorized strike activities by other members of the local union.

The other provision limiting union liability for unauthorized strike action appears in Article 43, Section 2, of each of the two supplemental agreements which bind only Local 377 and the Teamsters International Union. That section provides in pertinent part:

> "Section 2. It is further mutually agreed that the Local Union will, within two weeks of the date of the signing of this Agreement, serve upon the Employer a written notice, which notice will list the Union's authorized representatives who will deal with the Employer, make commitments for the Union generally, and in particular have the sole authority to act for the Union in calling or instituting strikes or any stoppages of work, and the Union shall not be liable for any activities unless so authorized. . . . It is further agreed that in all cases of an unauthorized strike, slowdown, walk-out, or any unauthorized cessation of work in violation of this Agreement, the Union shall not be liable for damages resulting from such unauthorized acts of its members.
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> "While the Union shall undertake every reasonable means to induce such employees to return to their

jobs during any such period of unauthorized stoppage of work mentioned above, it is specifically understood and agreed that the Employer during the first twenty-four (24) hour period of such unauthorized work stoppage shall have the sole and complete right of reasonable discipline short of discharge, and such Union members shall not be entitled to or have any recourse to any other provisions of this Agreement. After the first twenty-four (24) hour period of such stoppage, and if such stoppage continues, however, the Employer shall have the sole and complete right to immediately discharge any Union member participating in any unauthorized strike, slow-down, walk-out, or any other cessation of work, and such Union members shall not be entitled to or have any recourse to any other provision of this Agreement. . . ."

While the limitation of union liability for "any activities" contained in the first sentence of this section of these supplemental agreements will be seen to be limited by the context to activities "in calling or instituting strikes or any stoppages of work," the reference in the next-quoted sentence to "such unauthorized acts of its members" does refer to all acts involved in an unauthorized strike, slowdown, walk-out, or any other unauthorized cessation of work in violation of the agreement.

By these restrictions upon the liability of the unions the employers were undoubtedly bound. But they involved only liability for the unauthorized strike action of job stewards and individual union members. They did not relate to or purport to relieve the unions from their own specific promise "that there shall be no strike . . . without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise." This promise was binding on the unions as such, as well as on the union members, and it did not necessarily involve assumption by the unions of responsibility for unauthorized strike action of the individual members. While it was not a "no fault" guarantee against any work stoppage, *Penn Packing Co., Inc. v. Amalgamated Meat Cutters, Local 195*, 3 Cir. 1974, 497 F.2d 888, 890, it did involve the obligation of the unions, which was necessarily implied in their promise, not only not to call a strike themselves but also to take timely steps to end such an unauthorized strike by employing any and all such reasonable means at their command as might be needed to get their members back to work. It was the breach of this obligation by the unions, not any responsibility for the particular unauthorized actions of their members, which generated liability on their part.

Moreover, it will be observed that the existence of this implied obligation on the part of the unions was recognized in the supplemental agreements to which Local 377 and the Teamsters International Union were parties from which we have quoted above. The second paragraph of section 2 of article 43 of those agreements opens with the following preliminary clause:

> "While the Union shall undertake every reasonable means to induce such employees to return to their jobs during any such period of unauthorized stoppage of work mentioned above, it is specifically understood . . ."

As indicated by the syntactical composition of the parts as well as by the sense, the primary purpose of the second paragraph of section 2 is to confer upon the employer the right to discipline and, after 24 hours, to discharge union employees who participate in a contract-breaking strike. The preliminary subordinate clause introduced by the conjunction "while" and just quoted is in effect a recital of the unions' continuing obligation, which, as we have seen, is implied in their no-strike pledge, to employ all reasonable means to end such a strike. The reference in the clause to an "unauthorized stoppage of

work mentioned above" is a recognition that this obligation exists notwithstanding the unions' release from liability for its members' unauthorized strike activities which is contained in the immediately preceding paragraph. Moreover, the clause functions here as a drafting device to make it clear that the right which the paragraph confers on the employer does not operate to abrogate that union obligation, which is to continue side-by-side with the employer's right. Thus the recital is a recognition of the unions' implied obligation continuously to endeavor to end an unauthorized strike. Since the obligation is one which is implied from the no-strike clause as necessary for the fulfillment of the obligation of that clause, it is merely recognized as existing, but not created, by the recital of it in the preliminary clause of the paragraph from the Central States Area Local Cartage Supplemental Agreement which we have quoted. And since the no-strike clause appeared in all the supplemental agreements involved in this case it necessarily follows that the unions had a similar obligation under the agreements applicable to each of them, respectively, to use all reasonable means to end a strike existing in violation of that clause, regardless of the presence or absence of a recital of the obligation in the agreements to which a particular union was a party. Thus the obligation of Local 249 and the Teamsters International Union to endeavor to end the strike at Pittsburgh was identical with the obligation of Local 377 and the Teamsters International Union to do so at Warren.

We are satisfied that the continuing responsibility of the unions under the no-strike clause and the recognition of the consequent implied obligation on their part to use all available means to terminate an unlawful strike begun by their members, effectuates the intent of Congress in enacting section 301(a) of the Taft-Hartley Act to promote and make effective agreements not to strike. S. Rep. No. 105, 80th Cong., 1st Sess. (1947) pp. 16-18. Moreover, a construction of the no-strike clause as impliedly obliging

the unions to use their powers to implement it is responsive to the directive of the Supreme Court to the lower federal courts in deciding suits under section 301(a) of the Labor Management Relations Act to fashion a body of federal law in accord with the Congressional intent and with the basic goal of Congress to promote industrial peace. *Textile Workers Union v. Lincoln Mills,* 1957, 353 U.S. 448, 456-457.

We think that there is an additional basis for upholding the finding of union liability in this case. This is the so-called mass action theory. When all the members of a union employed by a given employer engage in a concerted strike not formally authorized by the union, as happened here, many courts hold the union responsible on the theory that mass action by union members must realistically be regarded as union action. The premise is that large groups of men do not act collectively without leadership and that a functioning union must be held responsible for the mass action of its members. *Wagner Electric Corp. v. Local 1104, Int. U. of E., R. & M. W.,* 8 Cir. 1974, 496 F.2d 954, 956; *Vulcan Materials Co. v. United Steelworkers of America,* 5 Cir. 1970, 430 F.2d 446, 455, *cert. denied,* 1971, 401 U.S. 963; *United Textile Workers of America v. Newberry Mills, Inc.,* W.D. S.C. 1965, 238 F. Supp. 366, 373; *Portland Web Pressmen's Union v. Oregonian Publishing Co.,* D. Or., 188 F. Supp. 859, 866, *aff'd on other grounds,* 9 Cir. 1960, 286 F.2d 4, *cert. denied,* 1961, 366 U.S. 912; *United States v. International Union, U.M.W. of A.,* D.C. D.C. 1948, 77 F. Supp. 563, 566-567, *aff'd on other grounds,* 177 F.2d 29, *cert. denied,* 1949, 338 U.S. 871.

In instances where, as here, in the case of the job stewards and committeemen, union functionaries have instigated, participated in or actively encouraged members to continue their unauthorized work stoppage, the courts have also based union liability for the resulting damage to the employer on the common law of agency, expressly made available to the parties to a breach of contract suit by

§ 301(b) and (c) of the Labor Management Relations Act of 1947, 29 U.S.C.A. §185(b) and (c). *Wagner Electric Corp. v. Local 1104, Int. U. of E., R. & M. W.*, 8 Cir. 1974, 496 F.2d 954, 956; *Vulcan Materials Co. v. United Steelworkers of America*, 5 Cir. 1970, 430 F.2d 446, 456; *cert. denied*, 1971, 401 U.S. 963; *Lewis v. Benedict Coal Corp.*, 6 Cir. 1958, 259 F.2d 346, 351-352, *modified on other grounds*, 1960, 361 U.S. 459. See also *General Truck Drivers, C. W. & H., Local No. 5 v. NLRB*, 5 Cir. 1969, 410 F.2d 1347. That a principal may ratify, by subsequent conduct inconsistent with repudiation, an agent's unauthorized acts earlier disaffirmed by the principal may well also be a theory of liability which might be applied under the facts of this case in order to implement federal labor policy and regardless of the contractual limitations upon the authority of the unions' subordinate officials, the stewards and committeemen. See *Restatement 2d of Agency*, §8A. Moreover, it will be observed that courts upholding liability in these cases, whether upon the mass action theory or agency or on both, have stressed the failure of the unions involved to take steps, other than written and oral exhortation, speedily to terminate illegal strikes as an indication of passive acquiescence in the strike. *Wagner Electric Corp. v. Local 1104, Int. U. of E., R. & M. W.*, 8 Cir. 1974, 496 F.2d 954, 956; *Vulcan Materials Co. v. United Steelworkers of America*, 5 Cir. 1970, 430 F.2d 446, 457, *cert. denied*, 1971, 401 U.S. 963; *United Textile Workers of America v. Newberry Mills, Inc.*, W.D. S.C. 1965, 238 F. Supp. 366, 372.

In the present case the district court, having concluded that the unions were obligated to use all reasonable means to terminate the strikes, found that they had not fulfilled their obligation in this regard. We cannot hold this finding to be erroneous. The record clearly establishes that the sole means employed by the unions to endeavor to end the strikes was the use of the spoken and written word in the form of declarations of the illegality of the strikes, instructions to return to work and persuasion and cajolery to that

end, all of which the striking union members rejected out of hand. It is clear, however, as the district court found, that in the ugly and violent situation which existed at Warren and Pittsburgh mere rhetoric was not enough. No stronger measures from the unions' arsenal were ever employed, however, although they were available. Thus no effort was made to discipline or remove the job stewards and committeemen who were organizing and leading the strikes,[6] to suspend or fine the striking union members, to place the local unions in temporary trusteeship, or even, until the very end of the strike, to take the votes of union members by secret ballot. Stronger measures, such as these, were indicated, were available and should have been taken to the extent necessary.

The unions rely on a statement by the district court that "Whether or not any of the untaken tacks or unsummoned measures would have produced the cessation of the strike is unknowable." Of course no human reactions can be known with certainty before they occur. But whether the use of the stronger measures which were available would actually have been successful in ending the strikes is beside the point. It was highly probable that they would have been since the use of only one of them in an earlier strike by a Teamsters local against Eazor had been sufficient to end it. The point here is that the unions were contractually obliged to carry out their agreement that there should be no strike by employing *all* reasonable means available to them to seek to end the existing unauthorized strikes and this they failed to do. Having thus chosen not to try out those stronger measures which were available, indicated, and probable of success they cannot be heard to say that such measures, if employed, would not have been successful in

6. That such discipline has been successfully used by a Teamsters local and that its use might well have been successful here is indicated by the case of an unauthorized strike by members of Local 241 of the Teamsters International Union against Eazor at Sharon, Pennsylvania in April 1968 where the strike was ended when a steward who refused to cross the illegal picket line was removed by the officers of the local union and another put in his place who led most of the strikers back to work across the picket line.

ending the strikes in this case and that, accordingly, it was not necessary to try them in order to absolve the unions of responsibility for the results of the strikes.

We conclude that the district court did not err in holding that Locals 377 and 249, as well as the Teamsters International Union, each had an obligation to use all reasonable means to end the strikes in which their members were involved, and that they all failed to fulfill this obligation and thereby became liable because of their own breach of contract for the damages resulting from the strikes which they made no adequate effort to end. It is not contended that Local 249 had any responsibility to seek to end the strike against Daniels at Warren. Eazor does contend, however, that Local 377 was obligated to seek to terminate the strike at Pittsburgh as well as that at Warren since the Pittsburgh strike was triggered by Local 377 members who came to Pittsburgh and established the picket line there. We cannot accept this proposition. The strikers at Pittsburgh were, of course, not members of Local 377 and it is, therefore, clear that Local 377 was not in a position to take effective measures to get them back to work, such as it could and should have employed with respect to its own members at Warren. Nor did Local 377's no-strike pledge run to Eazor or its operations at Pittsburgh. It might, perhaps, be contended that, although the strike at Pittsburgh actually involved local grievances there, it was triggered by the strike of Local 377 members at Warren, and that it was, therefore, foreseeable that strike action at Warren might cause losses to Eazor at Pittsburg as well as to Daniels at Warren. Based on this premise the argument might be made that Local 377, although not contractually obligated to Eazor, became responsible to it for the losses at Pittsburgh on some non-contractual theory. However, since it does not appear that such a theory was presented either to the district court or to us, we do not consider it.

The question remains as to the point in time when the liability of the unions arose. Having found that the unions had not called the strikes, the district court held that they were entitled to a reasonable period of time after the inception of the strikes in which to take the action required of them. The district court fixed this period of time as the first 48 hours after the commencement of the strike at Warren. The strike at Warren began at approximately 3:30 p.m. on August 20th. The Pittsburgh strike began on the morning of August 21st. The district court decided that the liability of all the unions arose simultaneously two days after the commencement of the strike at Warren. This decision was based on its finding that all the unions knew of the strikes by the morning of August 21. Having made similar contemporaneous verbal efforts to persuade the men to return to work, which proved wholly ineffective, they all knew within that period of time that stronger measures were required and they should have employed them at once. Technically, the court granted Local 377 a period of grace somewhat less than 48 hours and longer than that awarded to Local 249. This was permissible under the facts and circumstances test which the court decided should govern the extent of the period and which it applied in this instance. The parties do not seriously contest the reasonableness of this period of time, given the facts and circumstances of the strikes and the determination of the district court with respect thereto. We agree with the district court's determination in this regard which we think was a reasonable one.

We conclude that the Teamsters International Union and Local 377 became liable to Daniels for the damages proximately caused by their failure under their no-strike pledge to use all reasonable means to end the unauthorized strike at Warren, and that the liability arose 48 hours after the inception of the strike and continued until it ended with the closing of the Warren terminal. Likewise, we conclude that the Teamsters International Union and Local 249 be-

came liable to Eazor for the damages proximately caused by their failure under their no-strike pledge to use all reasonable means to end the unauthorized strike at Pittsburgh, and that the liability arose 48 hours after the inception of the strike at Warren and continued until it ended when the striking employees returned to work. Eazor urged in the district court that the Teamsters International Union and Local 377 were also liable to it with respect to the strike at Warren, basing this contention on the ground that it was the equitable owner of Daniels under the stock purchase agreement and was actually operating the Daniels business as part of its own at the time of the strike. The district court rejected this contention. On appeal Eazor does not seriously press it since as the result of the later actual merger of Daniels into Eazor a judgment now awarded to Daniels will inure to the benefit of Eazor in any event. It is, accordingly, unnecessary to consider this contention further and for the purposes of this case we have regarded Daniels as the employer at Warren and Eazor the employer at Pittsburgh.

Having considered and affirmed the district court's determination of liability we pass to the question of damages. On this question both plaintiffs and defendants assert error on the part of the district court. The plaintiff employers urge that the court unduly restricted them in their proof of damages and in the elements of damage recoverable and that it erred in holding that they failed to mitigate their damages. The defendant unions, on the other hand, argue that the plaintiffs failed to prove that they were damaged by the defendants' breach and that in any event the damages awarded by the court were excessive. Before discussing these contentions, however, we must consider the measure of damages to be applied in the facts of this case.

As we have already indicated, the liability which the unions incurred was for the damages proximately caused by the breach of their contractual obligation to use every

reasonable means to end the strikes. This breach took place at the expiration of two days after the commencement of the strike at Warren, when, as the district court found, it appeared that sufficient time had elapsed for the unions to take reasonable measures to end the strikes but they had failed to employ any measures more potent than mere rhetoric. We think that the measure of damages recoverable in this case is the actual loss sustained by each plaintiff as a direct result of the breach and which may reasonably be supposed to have been in the contemplation of the parties as the probable result of such a breach at the time the agreement was made. This is the traditional criterion for the ascertainment of damages for breach of contract which the district court rightly held was to be employed here. 11 *Williston on Contracts,* 3d Ed. Jaeger 1968, p. 323. The defendant unions argue that the measure of damages should not be the loss caused by the continued strikes but rather the loss caused by the failure of the unions to employ all reasonable measures within their power to end them. We agree, however, with the district court that in the circumstances of this case the two were identical in extent.

The unions' no-strike pledge was not an aleatory promise conditional upon the happening of a fortuitous event in the future. It was rather an undertaking that there should be no strike by union members during the term of the agreement in violation of the no-strike pledge. Such a strike, which would necessarily have to be carried on by union members, could hardly be described as a fortuitous event. Rather it would necessarily be an event generated within the unions' own constituency, whether with or without the approval of the union organizations, a situation with which the unions were obviously competent to deal as they had agreed to do. In view of the arsenal of powerful measures available to them it is highly probable that the unions could have ended the strikes promptly, given the will to do so. We think that the plaintiffs were entitled to rely upon the unions' doing so, this being the only way

in which, in the case of unauthorized strikes such as these, they could perform their no-strike promise. To hold otherwise would make a hollow mockery of the unions' no-strike pledge and would leave the plaintiffs without any remedy in damages if, as it has been held, the individual union members are not answerable in damages for illegal strike activity. *Sinclair Oil Corp. v. Oil, Chemical and Atomic Workers International Union,* 7 Cir. 1971, 452 F.2d 49.

If the unions had made a showing of the use of strong and punitive measures without result it would have been for the district court to determine whether they had relieved themselves from liability by fulfilling their obligation to exhaust all reasonable measures available to them to end the strikes. In determining whether available measures were reasonable the sole test would be whether they were within the power of the unions to employ and might be likely to be effective to end the strikes. Any possible negative effect upon the unions themselves and their internal organization, although much stressed by the defendants here, would not have been relevant. For it was the restoration of industrial peace with the plaintiffs, not their own well being, which the defendant unions were obligated by their no-strike pledges to seek. Here, as we have seen, the record fully supports the court's finding that the unions used only rhetoric and wholly abstained from the use of any more powerful measures, thus, in practical effect, acquiescing in the strike situation. Under these circumstances we are clear that they cannot now be heard to urge that the measures to which they did not resort would not have proved successful. It was the possibility of loss from a continuing strike, and not of some theoretical aleatory loss, which must reasonably be supposed to have been in the contemplation of the parties to these collective bargaining agreements. Moreover, the defendant unions were answerable in damages for the loss where, as here, their breach was a substantial factor in causing the plaintiffs' injury, *Krauss v. Greenbarg,* 3d Cir., 137 F.2d 569, 572, *cert. denied,* 1943,

320 U.S. 791, even though the acts of others were contributing factors also, as, for example, the actions of the strikers in this case. *Southern National Bank v. Crateo, Inc.,* 5 Cir. 1972, 458 F.2d 688, 697; *Krauss v. Greenbarg,* 3d Cir., 137 F.2d 569, 572. We conclude that the measure of damages in this case is the loss sustained by each plaintiff as the result of the continuance of the strikes after the first two days of the strike at Warren.

There was a great deal of evidence offered on the subject of the amount of the plaintiffs' losses resulting from the strikes. The evidence included the plaintiffs' accounting records, testimony by accountants with respect thereto, the plaintiffs' corporate reports and much other material. Differing accounting theories for establishing the losses were presented by the accountants who testified and the evidence was in many respects sharply conflicting. We will not here atttempt to outline the conflicting figures and theories with respect to them which the record presents, since it would serve no useful purpose to do so. The district court threaded its way through this maze and found as a fact that the total aggregate loss suffered by the two plaintiffs during the period of the strikes was $1,079,332.00. We need note here only that the defendant Local 377 urges that the plaintiffs failed to sustain their burden of proof by the evidence which they presented of the consolidated losses of Daniels, Eazor and Mahoning Equipment Company, an affiliate which owned and furnished much of the equipment used by Daniels and Eazor. Local 377 contends that Mahoning's figures should not have been included. We think, however, that in the circumstances of this case these figures were relevant. All the defendants urge that the loss established by the evidence was only $696,255.00 at the maximum and possibly as little as $208,375.00. Our consideration of the record satisfies us, however, that there was support in the evidence for the finding of the district court that the plaintiffs' total loss was $1,079,332.00 and we cannot say that this finding was erroneous. We, ac-

cordingly, adopt that figure as the district court did, as a starting point for the discussion of the damages.

The plaintiffs urge that the district court erred in failing to include in its determination of their losses attributable to the strike the profits which they alleged they lost both during and after the strike. The court agreed that the plaintiffs would have been entitled to have had such lost profits included if they had proved that such profits would have been earned absent the strike. The court found from the evidence, however, that such profits would not have been earned.

The plaintiffs claimed $80,719.00 in lost profits during August and September of 1968, the strike period, and $1,295,907.00 for profits lost following the strike in 1968, 1969 and 1970 as evidenced by a reduction in its volume of freight. Lost profits resulting from a breach of contract must be proved with reasonable certainty both as to fact and amount. *McBrayer v. Teckla, Inc.*, 5 Cir. 1974, 496 F.2d 122, 126; *McCormick on Damages*, 1935, p. 99. Ordinarily, evidence of sales before and after a breach of contract is acceptable proof showing the amount of revenue and net profits lost by the plaintiff as a result of the breach. *McBrayer v. Teckla, Inc.*, 496 F.2d 122, 127; *Flexitized, Inc. v. National Flexitized Corp.*, 2 Cir. 1964, 335 F.2d 774, 779, *cert. denied*, 1965, 380 U.S. 913. However, Eazor's and Daniels' income picture during the years 1966 to 1970 does not indicate any consistent earning power or any upward trend in profits. Eazor's earnings in 1966 and 1967 had fallen below its earnings of previous years. The integration of the operations of Daniels with those of Eazor in late 1967 may have caused the increased profits both plaintiffs experienced in the first two quarters of 1968. Whether this indicated a trend or was merely a temporary outcome of the new corporate arrangement is problematical. Eazor experienced a loss in July of 1968. The occurrence of the illegal strike in the last two months of the third quarter of 1968 no doubt accounted for the

large deficit Eazor sustained in that period. Eazor's comparative income statement for the last five months of 1968 shows a recoupment of revenue and profits in October of 1968. In 1969 Eazor's revenue and net earnings decreased and it operated with a deficit throughout 1969 and 1970.

The plaintiffs urge that the district court erroneously required them to produce "conclusive proof" of their claimed loss of profits during the period of the strike. It is sufficient as to this to say that we do not read the court's opinion as so holding. The court's use of the phrase "conclusive proof" referred to the necessity for the plaintiffs to demonstrate with reasonable certainty that they would have made a profit during the relevant period as well as the amount of it. This, the court said, and we agree, they had failed to do. We think that the phrase was intended merely to indicate that the plaintiffs were required to meet the standard of proof laid down in *McBrayer v. Teckla, Inc.*, 5 Cir. 1974, 496 F.2d 122, 126, cited above.

The claim for lost profits in the period following the strike was based largely on the contention that these would have been earned on business which the plaintiffs lost as the result of the strike. But here again the evidence was sharply conflicting. Indeed an Eazor annual report to stockholders which was in evidence stated that after the strike the company's operations quickly returned to normal "and we have regained all of our customers." We are satisfied from our examination of the record that the findings of the district court with respect to alleged lost profits are not clearly erroneous and must be sustained.

The defendants contended and the district court held that it was the duty of the plaintiffs to mitigate the damages resulting from the defendants' default by taking steps calculated to end the strike and by refraining from taking any action which would aggravate the situation and increase the damages. The court held that the plaintiffs had failed to comport themselves in accordance with the

legal standard applicable but had instead adhered to a hard-line course of retribution and obstinacy. It has been held that a plaintiff in a section 303 suit has the duty to minimize damages if it is reasonably possible to do so. *Vulcan Materials Co. v. United Steelworkers of America*, 5 Cir. 1970, 430 F.2d 446, 458. We think, however, that in the present case the plaintiffs did all that could reasonably be required of them to end the strike and thereby to mitigate the damages and that the district court clearly erred in deciding to the contrary.

In the case of *In re Kellett Aircraft Corp.*, 3 Cir. 1950, 186 F.2d 197, this court, considering and rejecting a claim that the buyer should have mitigated the damages in a claim for the breach of a contract for the fabrication of shower cabinets, said:

> "Whether or not the buyer's obligation to mitigate damages has been discharged depends on the reasonableness of its conduct. In this connection, reasonable conduct is to be determined from all the facts and circumstances of each case, and must be judged in the light of one viewing the situation at the time the problem was presented. Where a choice has been required between two reasonable courses, the person whose wrong forced the choice can not complain that one rather than the other was chosen. The rule of mitigation of damages may not be invoked by a contract breaker as a basis for hypercritical examination of the conduct of the injured party, or merely for the purpose of showing that the injured person might have taken steps which seemed wiser or would have been more advantageous to the defaulter. One is not obligated to exalt the interests of the defaulter to his own probable detriment." 186 F.2d at pp. 198-199.

We think that the doctrine of mitigation of damages has a limited application to situations in which a union or its members have breached a no-strike agreement by carrying on a strike in violation of the agreement.[7] The limitations which we suggested and applied in the *Kellett Aircraft* case upon the duty of the injured party to mitigate damages apply with even greater force to such a situation. The breach of contract involved in such a strike is quite different in purpose and effect from the breach of an ordinary commercial contract. For its purpose ordinarily, as in the case before us, is to extort by the economic pressure of the loss resulting from a work stoppage, a tactic of economic warfare, benefits from the employer which were denied to the union and its members by the collective bargaining agreement to which they have solemnly assented. Thus it is economic injury to the employer which the strikers contemplate as the means for securing the ends they seek. Under these circumstances the employer may hardly be required to mitigate the damages resulting from that injury by taking steps which amount to a capitulation to the demands of the strikers for benefits which the agreement has denied them. Nor, in our opinion, may the employer be required, upon the theory of mitigation, to take steps which he may reasonably regard as likely to have the effect of encouraging the strikers to repeat such contract-breaking breaches of industrial peace in the future. The unions cannot have it both ways; they cannot sit by without taking appropriate action while a mass of their members wrongfully imposes economic loss on an employer through an unlawful strike in order to secure benefits not granted by their labor agreement and then claim, when called upon to compensate the employer for the resulting loss, that he should have minimized it by acceding to the strikers' demands and thereby ending the work stoppage. Compare *Vulcan Materials Co. v. United Steelworkers of America*, 5 Cir. 1970, 430 F.2d 446, 458.

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7. While the ordinary rules of contract law apply to collective bargaining agreements, their application is necessarily limited in some respects. *NLRB v. C & C Plywood Corp.*, 1967, 385 U.S. 421, 430; *Transportation-Communication Employees Union v. Union Pacific R.R.*, 1966, 385 U.S. 157, 160-161.

It is to prevent just such an interruption of industrial peace between labor and management as took place in the present case that a no-strike clause binding on the union and its members is included in a collective bargaining agreement. As we have seen in the case before us such a clause not only commits the union not to call a strike itself, but also, if its members carry on an unauthorized strike, to assure the continuance of industrial peace by taking such steps as are within its power to get them back to work. To the same end, in such an agreement the employer may be given the right, as was done by the agreements in this case, to endeavor to terminate an unauthorized strike itself by discharging, without regard to existing grievance procedure, union employees who were engaging in such an illegal strike. Other than recourse to the injunctive processes of the courts this appears in fact to have been the only weapon which the plaintiffs in this case had available to them to use to end the strike. Barring its use or the intervention of the courts their only alternatives appear to have been persuasion by the written and spoken word, which proved wholly ineffective, sitting out the strike with its consequent further economic loss, or capitulation to some or all of the illegal demands of the striking employees.

In the present case the district court made the finding that Daniels,[8] which had discharged the employees who were the leaders of the strike at Warren, refused to agree to an offer made by union representatives on September 3d to settle the strike by having all the strikers, including the strike leaders who had been discharged for their illegal strike activity, return to work and submit to the grievance procedure the question whether the latter had been properly discharged. The court pointed out that on September 9th Eazor discharged five strike leaders at Pittsburgh, the stewards and committeemen of Local 249, and on the same

8. The court in this finding used the name "Eazor" in referring to the Daniels operation since Eazor was then operating Daniels. We use the name "Daniels" when referring to the Daniels operation by Eazor.

day "proposed that all remaining employees, not including those it proposed to put on a three-month suspension, return to work with the same condition attached—that the status of discharged employees was final and not subject to arbitration" under the grievance procedure. The court made the finding that Daniels and Eazor failed to mitigate damages on September 9th on which date, the court said, Daniels had refused the unions' settlement offer of September 3d.

We think, however, that the defaulting unions cannot be heard to urge that Daniels and Eazor, the injured parties, should have given up their right to maintain the outright discharge of the strike leaders, and have taken them back pending the outcome of grievance procedure, in an effort to settle the strikes, instead of insisting on their discharge as they had a contractual and legal right to do. *Labor Board v. Sands Manufacturing Co.*, 1939, 306 U.S. 332, 344. It was certainly not unreasonable for the plaintiffs to elect to insist on employing this, their most potent measure, to end the strike, particularly in view of the record of previous wildcat strikes by members of Locals 377 against Daniels and 249 against Eazor which the evidence in this case discloses. For the alternative was virtually to capitulate to the strikers' demands by taking back all the striking employees whom they had lawfully discharged which, under the agreement, they were not contractually bound to do. The latter course might well have ended the strike in a way which Eazor was reasonably entitled to believe, as its president testified, would only lead to similar unlawful action by its union employees in the future.

As the district court said, these parties were engaged in a hard-nosed business. The strikers' conduct was certainly hard-nosed for not only was it in the teeth of their no-strike pledge but it was characterized by widespread violence and intimidation. We repeat that we do not think that under these circumstances the contract breakers, the unions and their striking members, can be heard to complain

that Daniels and Eazor chose to exercise and maintain the right which these very unions had given them to seek to end the strikes by discharging and refusing to reinstate the strike leaders, rather than the possible alternatives which the plaintiffs could have regarded as virtual capitulation to the unlawful demands of the wildcat strikers. As we pointed out in the *Kellett Aircraft* case, the fact that the latter course would have been more advantageous to the strikers is not the test. As we there said: "One is not obligated to exalt the interests of the defaulter to his own probable detriment." We conclude, therefore, that the district court imposed too strict a mitigation standard upon the plaintiffs.

Our examination of the record satisfies us, moreover, that the district court erred in its finding, upon which the court's conclusion of failure to mitigate was largely predicated, that the proposal made by the union representatives on September 3d was rejected by Daniels on September 9th and that on the latter date Daniels proposed that all remaining employees not including those it proposed to put on a three-month suspension, return to work upon the condition that the status of discharged employees was final. As we read the evidence it clearly establishes that the meeting which was held on September 3d in the courtroom of District Judge Lambros in Cleveland was attended by the parties to the suit then pending before him in which an injunction was being sought,[9] their attorneys and other interested persons. The representatives of the unions who were present offered to secure the return of the striking employees if Daniels would reemploy all of them, the ultimate status of Roper and Eckley, who started the strike, to be submitted to the grievance procedure. Prior to this time Daniels had discharged four stewards and committeemen who were considered to be strike leaders and 26 other employees at Warren, all members of Local 377. Daniels

9. This was the suit begun in the Court of Common Pleas of Trumbull County, Ohio which is one of the two suits now before us on these appeals.

refused the offer at the same meeting, however, not on September 9th as the district court found, insisting that all remaining employees must return to work before it would negotiate the status of those who had been discharged. Moreover, there was no evidence that this proposal by the union officers had been submitted to or would have been approved by the body of Local 377 members employed by Daniels.

Shortly thereafter Daniels made a counterproposal which was presented to the striking Local 377 Daniels employees at a meeting attended by most of them in the union hall in Youngstown on September 9th. It appears that this proposal was that all of the strikers would be returned to work without penalty except for the stewards and committeemen, whose discharges would stand, and five or six others who were to have to take a suspension. The grievances of Roper and Eckley were to be processed through the grievance procedure. This proposal, which appears to be a reasonable compromise between the unions' position indicated by its September 3d offer and Daniels' own position on September 3d, was presented to the striking employees at the meeting by O'Neill and the attorney for the striking Local 377 members both of whom recommended that it be accepted but the strikers voted unanimously to refuse it.

Up to September 9th none of the striking members of Local 249 at Pittsburgh had been discharged. However, on that day Eazor discharged the road steward, the road committeeman and another member of Local 249 at Pittsburgh. Daniels and Eazor on the same day, as we have pointed out earlier in the opinion, sent letters to all striking Local 377 and 249 members, respectively, other than Roper, Eckley, the stewards and the committeemen, offering them the opportunity to return to work without penalty if they returned on September 11th and with a penalty if they returned on the 16th. This offer, which we believe also was a reasonable effort on the plaintiffs' part to end the strike, was rejected, however, and on September 17th

Daniels sent letters of discharge to the remaining 157 striking employees at Warren, and closed that terminal permanently, thus ending the strike there. The strike continued at Pittsburgh, however, until following an affirmative vote by secret ballot on September 24th the striking members of Local 249 voted to return to work the next day and ended the strike there. By the counterproposal submitted by Daniels to the members of Local 377 on September 9th and the letter which Eazor sent to the members of both locals on the same day Daniels and Eazor offered to take back all their striking employees, including the 26 who had been previously discharged at Warren, except the stewards and committeemen, who had led the strikes. These strike leaders Daniels and Eazor had, as we have seen, a clear legal and contractual right to discharge without recourse to grievance procedure. As we have indicated, the duty to mitigate damages did not require them to give up this basic right. To hold otherwise would divest the right of any meaning. We conclude that by the counterproposal of September 9th and the offer contained in the letter of the same date, both of which the strikers rejected, Daniels and Eazor satisfied any obligation which rested on them to take action to mitigate their damages. The determination of the district court that they failed in their duty to mitigate their damages accordingly cannot be sustained. It was, accordingly, error for the court to reduce on this account the damages awarded to them.

Included in the figure of $1,079,332.00 representing the plaintiffs' loss was an item of $52,108.00 expended for fees and expenses of counsel which the district court disallowed and deducted from the loss allowed. The plaintiffs urge that this was error, asserting that these fees and expenses were incurred in connection with the work stoppage and were, therefore, properly allowable as an element of their loss. Conceding that legal expenses of that nature would be properly allowable, *Sheet Metal Workers Local 223 v. Atlas Sheet Metal Co.*, 5 Cir. 1967, 384 F.2d 101, 110, the

district court nonetheless held that the plaintiffs had failed to sustain their burden of proving what portion, if any, of these legal expenses were directly related to ending the strikes. In so holding we are convinced that the court erred. On the contrary, our examination of the uncontradicted evidence satisfies us that the plaintiffs did establish that all of this amount but a very small portion, so small in fact as to be fairly treated as *de minimus*, was incurred in connection with the work stoppage. This item must, accordingly, be allowed.

The district court having determined that the aggregate loss proved to have been suffered by the plaintiffs as the result of the strike was $1,079,332.00, a determination which we have accepted, it remains to assign to each of the two actions here consolidated the share properly applicable to it and to determine the portion of that figure attributable to the period for which the defendant unions were responsible.[10]

To apportion the loss between Daniels and Eazor the district court determined that 36.5% of the loss was incurred by Daniels as the result of the strike by Local 377 members and 63.5% by Eazor as the result of the strike by Local 249 members. This apportionment is not seriously challenged on these appeals and we accept it. Applying it to the figure of $1,079,332.00, the aggregate loss of both plaintiffs resulting from the strikes, the loss sustained by Daniels amounted to $393,956.18 and that sustained by Eazor amounted to $685,375.82.

To take into account the fact that the liability of Local 377 and the Teamsters International Union for the loss sustained by Daniels from the strike at Warren did not arise until the third day of that strike, which lasted 29

10. The district court computed the portion of the aggregate loss suffered by the two plaintiffs which was allocable to the first two days of the strike and subtracted that amount from the aggregate loss before determining the portion of that loss which was sustained by each plaintiff. We have reversed this process in order to arrive at an apportionment of the damages which we believe will be more equitable in view of our denial of the defendants' claim for mitigation of the damages.

days in all, we must subtract 2/29 of the Daniels loss from its total loss. Two twenty-ninths of $393,956.18 is $27,-169.39. Subtracting this figure from Daniels' total loss of $393,956.18 leaves a figure of $366,786.79 representing the portion of the loss sustained by Daniels for which Local 377 and the Teamsters International Union are responsible. Taking into account the fact that the liability of Local 249 and the Teamsters International Union for the loss sustained by Eazor from the strike at Pittsburgh did not arise until August 22nd, the third day of the strike at Warren, which was the second day of the strike at Pittsburgh, and that the Pittsburgh strike lasted 35 days in all, we must subtract 1/35 of Eazor's loss from its total loss. One thirty-fifth of $685,375.82 is $19,582.17. Subtracting this figure from Eazor's total loss of $685,375.82 leaves a figure of $665,793.65 representing the portion of the loss sustained by Eazor from the strike for which Local 249 and the Teamsters International Union are responsible.

The district court in entering its judgment awarded prejudgment interest from September 25, 1968, the date on which the work stoppage ended. The defendants strongly object to this award urging that it was improper to allow such interest in a suit for unliquidated damages. The general rule is that when the damages resulting from a breach of contract are ascertainable with mathematical precision prejudgment interest is awardable as of right. If, however, the claim is not for a liquidated sum but is nonetheless pecuniary rather than personal in its nature many courts will add prejudgment interest to the amount which they find would have been just compensation at the time of the breach, when in the exercise of their discretion it appears necessary to do so in order to arrive at fair compensation at the time of judgment. *Miller v. Robertson*, 1924, 266 U.S. 243, 258; *United States v. Bethlehem Steel Corp.*, 3 Cir. 1940, 113 F.2d 301, 308, *aff'd*, 1942, 315 U.S. 289; *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 3 Cir. 1956, 235 F.2d 224, 231; *Marrazzo v.*

Scranton Nehi Bottling Co., 1970, 438 Pa. 72, 263 A.2d 336; *Restatement of Contracts* § 337; *McCormick on Damages*, 1935, 356. We think that this is an appropriate rule for discretionary application as a matter of federal law in actions brought under section 301 of the Labor Management Relations Act for breaches of labor agreements and that the district court did not err in its discretionary application of the rule in this case.

The judgment entered by the district court in these consolidated cases will be modified by awarding to the plaintiff Daniels against the defendants Teamsters International Union and its Local 377 damages in the sum of $366,786.79 plus interest thereon at the rate of 6% per annum from September 25, 1968 to June 10, 1974, the date of judgment, and to the plaintiff Eazor against the defendants Teamsters International Union and its Local 249 damages in the sum of $665,793.65 plus interest thereon at the rate of 6% per annum from September 25, 1968 to June 10, 1974, the date of judgment, in each case with costs. As so modified the judgment will be affirmed. Each appellant shall bear its own costs on appeal.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX E

Judgment of Court of Appeals (July 31, 1975)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1759/74-1760

EAZOR EXPRESS, INC., a corporation, *Appellant in No. 74-1759*

v.

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION No. 249, *Appellants in No. 74-1760*

(D.C. Civil Action No. 68-1014)

No. 74-1761/74-1762

DANIELS MOTOR FREIGHT, INC., EAZOR EXPRESS, INC., *Appellants in No. 74-1761*

v.

LOCAL 377 INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Appellants in No. 74-1762*

(D.C. Civil Action No. 69-1235)

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: MARIS, VAN DUSEN and GARTH, *Circuit Judges*

Judgment

These causes came on to be heard on the records from the United States District Court for the Western District of Pennsylvania and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed June 10, 1974, be, and the same is hereby modified. Plaintiff Daniels is awarded damages in the sum of $366,786.79 plus interest thereon at the rate of 6% per annum from September 25, 1968 to June 10, 1974, the date of judgment, together with costs, against defendants Teamsters International Union and its Local 377. Plaintiff Eazor is awarded damages in the sum of $655,793.65 plus interest thereon at the rate of 6% per annum from September 25, 1968 to June 10, 1974, the date of judgment, together with costs, against defendants Teamsters International Union and its Local 249. As so modified, the judgment appealed from be, and the same is hereby affirmed. Each appellant shall bear its own costs on appeal.

ATTEST:

/s/ THOMAS F. QUINN
Clerk

July 31, 1975

APPENDIX F

Order of Court of Appeals on Petition for Rehearing (August 29, 1975)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 74-1759, 74-1760, 74-1761 & 74-1762

EAZOR EXPRESS, INC. and DANIELS MOTOR FREIGHT, INC., *Appellants*

v.

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION No. 249; and LOCAL 377 INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Cross-Appellants*

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and MARIS, VAN DUSEN, ALDISERT, GIBBONS, ROSENN, HUNTER and GARTH, *Circuit Judges*.

The petition for rehearing filed by cross-appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ VAN DUSEN
Judge

Dated: Aug. 29, 1975